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NICOLE DINAPOLI v. STEVEN REGENSTEIN ET AL.  
(AC 38576)

Lavine, Mullins and Pellegrino, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant dentist, R, and his dental practice for, inter alia, dental malpractice in connection with a teeth whitening procedure that R had performed on the plaintiff. The matter was tried to a jury, which returned a verdict in favor of the defendants. From the judgment rendered thereon, the plaintiff appealed to this court. She claimed, inter alia, that the trial court improperly excluded certain portions of the testimony of her expert witness, M, relating to the standard of care. *Held:*

1. The trial court did not abuse its discretion in striking certain portions of M's testimony, as the testimony was either irrelevant or not responsive to the questions posed by counsel; the portions of M's testimony that did not pertain to how he treats patients who want to undergo the same teeth whitening procedure as the plaintiff did here were not relevant because they did not make the defendants' alleged breach of the standard of care in treating the plaintiff more or less probable, and the portions of M's testimony in which he explained the reasoning behind the explanations he gave to his patients were not responsive because the answers went beyond the scope of the specific questions posed by the plaintiff's counsel.
2. The plaintiff could not prevail on her claim that the trial court improperly precluded her from presenting testimony regarding the facts that formed the basis of the opinion of M, who stated on direct examination that the sources he had reviewed to form his opinion were found on the Internet from people who had issues with and complaints about the same teeth whitening procedure, but was precluded from summarizing those comments and complaints; because the comments and complaints themselves were inadmissible hearsay, testimony summarizing their contents would have been admissible only for the limited purpose of explaining the basis on which M had formed his expert opinion, and the trial court did not abuse its discretion in precluding M from testifying on that point, as the plaintiff failed to show that comments posted on the Internet and complaints made with a federal agency by unknown individuals were the types of sources on which experts in the dental field reasonably rely when rendering expert opinions.
3. The trial court did not abuse its discretion by precluding the plaintiff from questioning the defendants' expert, K, on cross-examination about certain materials received from a company associated with the teeth whitening product used on the plaintiff that he had reviewed to form his expert opinion, the questions having concerned matters outside the

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scope of direct examination; moreover, although experts are permitted to testify about the materials on which they rely in forming their opinions, it was not an abuse of discretion for the trial court to sustain the defendants' objection to certain cross-examination of K where the plaintiff's counsel did not ask K to explain the content of the sources on which he relied, but, rather, asked him to state whether he thought those sources were factually accurate.

4. The plaintiff's claim that the trial court abused its discretion by failing to permit M to answer a hypothetical question posed by her counsel was unavailing; the hypothetical question posed by the plaintiff's counsel failed to present the facts in such a manner as to bear a true relationship to the evidence presented at trial, and, therefore, the defendants' objection to it was properly sustained by the court.

Argued March 16—officially released August 15, 2017

*Procedural History*

Action to recover damages for, inter alia, dental malpractice, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe, J.*, granted the plaintiff's motion to cite in *Novsam-Regenstein, P.C.*, as a party defendant; thereafter, the complaint was withdrawn as to the defendant Discus Dental, LLC, et al.; subsequently, the matter was tried to the jury before *Hon. William B. Rush*, judge trial referee; verdict and judgment for the named defendant et al., from which the plaintiff appealed to this court. *Affirmed.*

*G. Oliver Koppell*, pro hac vice, with whom was *Richard T. Meehan, Jr.*, for the appellant (plaintiff).

*Beverly Knapp Anderson*, with whom was *Craig A. Fontaine*, for the appellees (named defendant et al.).

*Opinion*

LAVINE, J. The plaintiff, Nicole DiNapoli, appeals from the judgment, rendered after a jury trial, in favor of the defendants, Steven Regenstein, a dentist, and his practice, Novsam-Regenstein, P.C., doing business as

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Westport Esthetic Dental Group.<sup>1</sup> The plaintiff claims that the trial court abused its discretion by (1) striking four portions of the testimony of her expert witness regarding the standard of care, (2) precluding her from presenting testimony regarding the facts that the experts relied on in forming their opinions, and (3) precluding her expert from giving his opinion in response to a hypothetical question. We affirm the judgment of the trial court.<sup>2</sup>

The following facts and procedural history are necessary to our resolution of the plaintiff's appeal. On June 2, 2011, the plaintiff, a then thirty-one year old woman, went to Westport Esthetic Dental Group for a full cleaning, X-rays, and a consultation regarding "Zoom!" teeth whitening (Zoom). Zoom is a teeth whitening procedure in which a dentist applies a gel to a patient's teeth and puts a bright light in close proximity to the patient's mouth for three fifteen minute periods. When the plaintiff arrived, she filled out an intake form, indicating that

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<sup>1</sup> The amended complaint also named Discus Dental, LLC, Philips Oral Healthcare, Inc., and Philips Electronics North America Corporation as defendants. On September 8, 2015, the plaintiff withdrew the action against them and, therefore, in this opinion we refer to Regenstein and Westport Esthetic Dental Group individually by name and collectively as the defendants.

<sup>2</sup> The plaintiff also claims that the court abused its discretion by precluding her from introducing into evidence the medical records of Gail Whitman, the plaintiff's dermatologist, concerning the plaintiff's hair loss. She argues that the evidence was relevant to prove that she suffered from anxiety and emotional distress as a result of the treatment at issue, and "[t]his exclusion severely prejudiced the plaintiff's ability to establish a *claim for damages* . . . ." (Emphasis added.) In support of her argument, the plaintiff stated in her rely brief to this court that she "did not seek to have the records . . . introduced as expert evidence that showed there was causation with respect to the . . . procedure and accompanying hair loss. Rather, the plaintiff sought to have Dr. Whitman's records admitted as evidence that [she] suffered great anxiety about the loss of her hair due to the . . . treatment." In light of our conclusion that the court did not abuse its discretion in its evidentiary rulings regarding expert testimony, the question of damages is not relevant, and, thus, we need not address this claim.

she had a history of bleeding gums, acid reflux, anxiety, headaches, and tooth sensitivity. While cleaning the plaintiff's teeth, a dental hygienist and the plaintiff spoke "at length" about her history of tooth sensitivity, including that her teeth were "very sensitive" to the use of certain whitening strips. Afterward, Regenstein examined the plaintiff's teeth, and they "went over almost the exact information" that she and the hygienist spoke about, talking a "good amount" about her history of sensitive teeth. The plaintiff did not inform Regenstein that she had a history of "extreme sensitivity to bleach." Either Regenstein or the hygienist suggested to the plaintiff that she use fluoride rinse, Sensodyne toothpaste, and Motrin prior to the Zoom whitening procedure in order to alleviate any sensitivity and pain she may feel during or after the procedure. After the consultation, the plaintiff made an appointment to undergo the procedure on June 22, 2011, but she did not receive or sign a consent form explaining the known risks associated with Zoom whitening.

On June 22, 2011, the plaintiff returned to Westport Esthetic Dental Group to undergo the Zoom whitening procedure. During the second exposure to the bright light, she began to experience aching in her mouth, and during the third exposure, she experienced "extreme pain." Later that day, the plaintiff called the Westport Esthetic Dental Group because she was in "excruciating pain" and was told that she could take Motrin, use relief gel, and rinse with fluoride to relieve the pain. Her pain did not subside, and she as well as members of her family continued to call Westport Esthetic Dental Group. On June 29, 2011, the plaintiff spoke with Regenstein, and he prescribed her fluoride gel and fluoride toothpaste. As recommended, the plaintiff brushed with the fluoride toothpaste, rinsed with fluoride rinse, wore fluoride molds, used relief gel, and gargled with warm water and baking soda for the next couple of

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months. She continued to experience pain and tooth sensitivity in her mouth for four years, however, and, during that time, she suffered from hair loss for six months.

On March 11, 2015, the plaintiff filed an amended complaint, alleging (1) dental malpractice arising from the defendants' breach of the standard of care prior to, during, and after administering the Zoom whitening treatment, and (2) lack of informed consent and failure to warn arising from the defendants' failure to warn her of the known risks associated with Zoom whitening<sup>3</sup> or the defendants' failure to recommend alternative treatment options. She alleged that, as a direct and proximate result of the defendants' actions, she suffered from and will continue to suffer from increased tooth sensitivity, incurred expenses for medical treatment, hair loss, ongoing physical pain, and anxiety.

A number of witnesses testified during the plaintiff's case-in-chief, including the plaintiff and Regenstein. She also called Andrew Mogelof, a dentist at Mogelof Dental Group, as an expert witness. The defendants, in turn, presented the testimony of Peter Katz, a dentist in private practice, as an expert witness. On direct examination, the plaintiff's counsel asked Mogelof a number of questions pertaining to the standard of care that dentists should follow when treating new patients for Zoom whitening. The defendants' counsel objected to four lines of questioning, and the court sustained the objections. The plaintiff's counsel then asked Mogelof a hypothetical question regarding breach of the standard of care. In addition, the plaintiff's counsel questioned

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<sup>3</sup> The plaintiff alleged in her amended complaint that the known risks of Zoom whitening included that "Zoom whitening is contraindicated for patients using Accutane," and that "Zoom whitening is not recommended for patients with sensitive teeth or that Zoom whitening may increase [teeth] sensitivity." She did not specifically allege that the defendants knew or reasonably should have known about the known risks.

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Mogelof and Katz about the facts on which they relied in forming their opinions. The defendants' counsel objected to both lines of questioning, and the court sustained the objections.

Mogelof did testify as to the standard of care in 2011 for consulting and treating patients for Zoom whitening. He also testified that, in his expert opinion, the defendants breached the standard of care prior to and after treating the plaintiff and that they failed to inform her of the known risks associated with Zoom whitening before obtaining her consent. Notably, Mogelof never testified, in any way, that the Zoom whitening or any subsequent treatment caused the plaintiff's injuries. See footnote 14 of this opinion.

On October 6, 2015, the jury found that the defendants had not breached the standard of care in treating the plaintiff, but found that they had failed to obtain the plaintiff's informed consent. It rendered a verdict in favor of the defendants, however, because it found that their failure to obtain her informed consent was not the proximate cause of her injuries. This appeal followed. Additional facts will be set forth as needed.

As a threshold matter, we set forth the standard of review for all of the plaintiff's claims, which all concern the court's evidentiary rulings. "The decision to preclude a party from introducing expert testimony is within the discretion of the trial court." (Internal quotation marks omitted.) *Amsden v. Fischer*, 62 Conn. App. 323, 325–26, 771 A.2d 233 (2001). "We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Maynard v. Sena*, 158 Conn. App. 509,

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513–14, 125 A.3d 541, cert. denied, 319 Conn. 910, 123 A.3d 436 (2015).

## I

The plaintiff’s first claim is that the court abused its discretion by striking four portions of Mogelof’s testimony relating to the standard of care. She argues that the excluded testimony was necessary to her dental malpractice claim because the testimony was relevant to establishing the standard of care and “would have enabled the jury to find that the defendants departed from the standard of care . . . .” We disagree.

During the plaintiff’s direct examination of Mogelof, her counsel asked: “[W]hat do you do with respect—let’s take a patient who is not a prior patient of the office. What is your practice?” During his lengthy explanation,<sup>4</sup> the plaintiff’s counsel interrupted him and asked if he could “confine [his testimony] only to patients seeking Zoom.” The defendants’ counsel objected and moved to strike Mogelof’s testimony

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<sup>4</sup> The following is an excerpt of Mogelof’s stricken testimony in response to the question: “And let’s take the patient coming in and seeing the dental hygienist as a first visit. Patient usually has various treatments provided, full mouth series of X-rays would be taken, if appropriate, and a very thorough examination by me or my son, a doctor’s exam. If there’s medical information or dental history information, usually forms are filled out by the patient. . . . And once the patient is in the office and has filled out all [of] the forms, usually if there is any information on the forms, for instance, in the medical history, that are concerning to us in any way, I will come into the treatment room and I will introduce myself to the patient and review a couple of those items if they’re concerning or questionable to me. If not, then the patient will have—usually have a cleaning, and, as I said, they would have a full set of X-rays. And the hygienist would then perform her examination and take her detailed information, which would include an oral cancer screening exam . . . . They may take photographs of the patient’s teeth with an intraoral . . . camera, which we have. So those images are loaded into the patient file. If there’s a particular concern that the patient brings up about a problem they’re having, then that problem is examined and documented by the hygienist to report to me when I come back into the room for an examination.”

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because his answer was not confined to patients seeking Zoom whitening treatment. The court sustained the objection, thereby striking the testimony.

Then, the plaintiff's counsel asked Mogelof: "What is the conversation you have with them . . . only with respect to the person coming in and saying they want Zoom." While Mogelof was giving a lengthy answer to the question,<sup>5</sup> the defendants' counsel objected because it was a "narrative response," and the court sustained the objection.

The plaintiff's counsel also asked Mogelof: "What . . . do you specifically tell them about the Zoom process, if anything?" During his answer,<sup>6</sup> Mogelof stated:

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<sup>5</sup> Mogelof gave the following stricken testimony in response to the question: "The conversation is, if there are any things in their dental history or their dental information or their medical form that they filled out that relate to the Zoom process, then I need to go into that in more depth. . . . [F]or instance, if a patient says that they have extreme dry mouth and it's on the basis of a medication that they are taking, then I have to determine whether or not, if they have a dry mouth, what influence is a dry mouth on using a Zoom product. If they say that they are taking—they have a hip problem and they are taking noninflammatory medication, noninflammatory medications, I have to determine whether or not those medications, whatever they are, have any influence of the Zoom process because the Zoom company Discus has provided information to us regarding a list of [medications] that may render the patient—may create a problem with the patient if they go through the Zoom process. So let's say that the patient has taken a medication that I feel—."

<sup>6</sup> Mogelof gave the following testimony in response to the question: "Specifically, I tell them about the Zoom process itself. I describe the steps in the process. I describe the importance of using various materials that are recommended by the Zoom company. And I tell the patient that this process involves materials that are applied to the teeth. And they're applied to the teeth by having the teeth isolated away from the rest of the lips and the tongue and the cheeks of the mouth so that just the teeth are exposed. And the material that's placed on the teeth that's part of the Zoom process is an agent or a material that will, through the process of the use of a light that activates the material, will cause teeth to whiten. And the stains or colors of the teeth will hopefully be whitened. I say hopefully because every patient may have a different result from Zoom. And people need to know that. *In addition, we know, dentists know, anybody that uses Zoom knows—*" (Emphasis added.)

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“In addition, we know, dentists know, anybody that uses Zoom knows—.” The defendants’ counsel objected and moved to strike that sentence, and the court sustained the objection, thereby striking the testimony.

Finally, the plaintiff’s counsel asked Mogelof: “So let’s confine [this to] what you tell patients, no[t] why you tell them but what you tell them.” During his answer,<sup>7</sup> he stated: “In addition, I also tell them that sometimes patients may have sensitivity of their teeth as a result of Zoom because that’s what the experience is and that’s what [Discus Dental, a company associated with Zoom whitening] has informed all of us who use Zoom.” The defendants’ counsel objected and moved to strike his testimony about what “the Discus company did at any point in time,” and the court sustained the objection, thereby striking the testimony.

“Evidence is admissible only if it is relevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . It is well settled that questions of relevance are committed to the sound discretion of the trial court.” (Internal quotation marks omitted.) *Pickel v. Automated Waste Disposal, Inc.*, 65 Conn. App. 176, 184, 782 A.2d 231 (2001). In addition,

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<sup>7</sup> Mogelof gave the following testimony in response to the plaintiff’s question: “So I tell them that Zoom may not whiten their teeth as much as they want. I tell them that it is a process of about two and a half hours in the office, during which time their mouth is prepared for and isolated for the Zoom process. We have some photographs that we show the patient, what the apparatus looks like, so they have an understanding of what they’re going to have in their mouth. In addition, I also tell them that sometimes patients may have sensitivity of their teeth as a result of Zoom because that’s what the experience is *and that’s what the Discus company has informed all of us who use Zoom.*” (Emphasis added.)

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testimony that is not responsive to a question is inadmissible. See *State v. Ankerman*, 81 Conn. App. 503, 516–17, 840 A.2d 1182 (no abuse of discretion in sustaining prosecutor’s objection because defendant’s answer not responsive to question posed), cert. denied, 270 Conn. 901, 853 A.2d 520, cert. denied, 543 U.S. 944, 125 S. Ct. 372, 160 L. Ed. 2d 256 (2004).

On the basis of our review of the record, we conclude that the court did not abuse its discretion in striking certain portions of Mogelof’s wide ranging testimony because that testimony was either irrelevant or not responsive to the questions posed by the plaintiff’s counsel. The court did not abuse its discretion by concluding that the portions of Mogelof’s testimony that did not pertain to how he treats patients who want to undergo Zoom whitening were irrelevant because they did not make the defendants’ alleged breach of the standard of care in treating the plaintiff for Zoom whitening more or less probable. In addition, it was not an abuse of discretion to exclude portions of Mogelof’s testimony that were not responsive because the answers went beyond the scope of the specific questions posed by the plaintiff’s counsel.

## II

The plaintiff’s second claim is that the court abused its discretion when it excluded another portion of Mogelof’s testimony and two portions of Katz’ testimony that regarded the facts on which they had based their expert opinions. She argues that the jury did not find that the defendants departed from the standard of care in her dental malpractice claim, in part, because “[Mogelof] . . . was not allowed to support his opinion,” and she was “deprived of an opportunity to fully examine the veracity of the process in which [Katz] reached his expert opinion . . . .” We disagree.

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A

## Mogelof's Testimony

During the plaintiff's direct examination of Mogelof, her counsel asked him what sources he "reviewed" before testifying. Mogelof said that he reviewed "comments I found on the web [from people] who were having issues with going through the Zoom process" and "complaints that were listed with the [Food and Drug Administration] . . . ." When he attempted to give a summary of the comments and complaints, the defendants' counsel objected on the grounds of hearsay and relevance. The plaintiff's counsel argued that Mogelof's testimony was admissible because "an expert can testify with respect to matters that might otherwise be considered hearsay if they have assisted the expert in . . . forming his expert opinion." The court sustained the objection.<sup>8</sup>

"An out-of-court statement used to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception applies." (Internal quotation marks omitted.) *State v. Owen*, 101 Conn. App. 40, 42, 919 A.2d 1049, cert. denied, 283 Conn. 902, 926 A.2d 671 (2007). However, "[a]n expert may base his opinion on facts or data not in evidence, *provided they are of a type reasonably relied on by experts in the particular field*. . . . [W]hen the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." (Citations omitted; emphasis added; internal quotation marks omitted.) *In re Barbara J.*, 215 Conn. 31, 43, 574 A.2d 203 (1990). "Whether inadmissible facts are of a

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<sup>8</sup> The court stated in response to the argument of the plaintiff's counsel: "In certain case[s] that's true, but just because he read something on the web doesn't mean it's [true] in this one."

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type customarily relied on by experts in forming opinions is a preliminary question to be decided by the trial court.” Conn. Code Evid. 7-4 (b), commentary.

In giving his or her opinion, an “expert must, of course, be allowed to disclose to the trier of fact the basis facts for his [or her] opinion, as otherwise the opinion is left unsupported in midair with little if any means for evaluating its correctness . . . .” (Internal quotation marks omitted.) *Carusillo v. Associated Women’s Health Specialists, P.C.*, 72 Conn. App. 75, 88, 804 A.2d 960, quoting C. McCormick, Evidence (3d Ed. 1984) § 324.2, p. 910. “[O]ur appellate courts have construed [Conn. Code Evid. § 7-4] to permit the admission of otherwise inadmissible hearsay evidence for the limited purpose of explaining the factual basis for the expert’s opinion. . . . [I]nformation on which an expert relied that is not offered for its truth but is offered to show that the expert relied on it is not hearsay and may be the subject of proper cross-examination to test the basis of that expert’s opinion.” (Citations omitted; emphasis omitted; internal quotation marks omitted.) *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 287–88, 156 A.3d 534 (2017), *petitions for cert. filed* (Conn. May 15, 2017) (Nos. 160445, 160446), *cross petition for cert. filed* (Conn. June 26, 2017) (No. 160509). It is at the discretion of the court to decide whether the sources an expert relied on should be admitted and subjected to cross-examination. See *id.* 289–90 (no abuse of discretion in court admitting information on which expert relied in forming opinion and allowing opposing party to test reliability of information through cross-examination).

We conclude that the court did not abuse its discretion in sustaining the defendants’ objection. The comments and complaints themselves were inadmissible hearsay, and, therefore, testimony summarizing their

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contents would have been admissible only for the limited purpose of explaining the basis on which Mogelof formed his expert opinion. We find no abuse of discretion in the court's decision to preclude Mogelof from testifying on this point because the plaintiff failed to show that comments posted on the Internet and complaints made to the Food and Drug Administration by unknown individuals were the types of sources on which experts in the dental field reasonably rely when rendering expert opinions.

## B

### Katz' Testimony

The plaintiff further claims that the trial court abused its discretion by precluding her from asking Katz about materials that he had reviewed for purposes of forming his expert opinion. Specifically, she claims that the trial court improperly precluded her inquiry into Katz' reliance on (1) certain documents from Discus Dental, and (2) two of the plaintiff's exhibits. We disagree.

## 1

During the defendants' direct examination of Katz, the defendants' counsel asked him about the materials he reviewed before testifying. Katz listed a number of sources that he had reviewed,<sup>9</sup> but he did not state that he reviewed any documents from Discus Dental, or that he received any documents from Discus Dental. During the plaintiff's cross-examination of Katz, her counsel asked: "You testified, Dr. Katz, that you had received certain materials from Zoom, from Discus Dental . . . . Is that correct, you got some documents from them,

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<sup>9</sup> Specifically, Katz stated that he reviewed "[t]he complaint, the revised complaint, the depositions of the plaintiff, the defendant, and Dr. Mogelof, the other expert witness, dental records of Dr. Regenstein, [and] Dr. Diette. There were medical records from the skin doctor, her primary care physician, her neurologist, [and] some [pharmacy] records on medications."

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right?” The defendants’ counsel objected on the ground that the question was outside the scope of direct examination and irrelevant. The court sustained the objection.

“It is a well established rule of evidence that cross-examination is restricted to matters covered on direct examination. . . . A question [on cross-examination] is within the scope of the direct examination if it is designed to rebut, impeach, modify, or explain any of the defendants’ direct testimony. . . . The trial court is given broad discretion to determine whether a particular line of cross-examination is within the scope of the direct examination.” (Citations omitted; internal quotation marks omitted.) *State v. Ramos*, 261 Conn. 156, 176–77, 801 A.2d 788 (2002), overruled on other grounds by *State v. Elson*, 311 Conn. 726, 740, 91 A.3d 862 (2014).

We conclude that the court did not abuse its discretion in sustaining the defendants’ objection. Katz did not testify during direct examination that he reviewed any documents from Zoom or Discus Dental or that he received documents from Discus Dental. Thus, the court did not abuse its discretion in concluding that the question was outside the scope of the direct examination.

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During the plaintiff’s cross-examination of Katz, he stated that he relied, in part, on two of the plaintiff’s exhibits in forming his expert opinion: a dental assistant’s notes dated June 22, 2011,<sup>10</sup> and an instructional

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<sup>10</sup> Regenstein testified that the notes were written by Jennifer Schreier, a dental assistant in the office. The notes were broken up into two parts. The first part referred to the notes taken immediately after the procedure, and the second referred to the notes taken immediately after the plaintiff called the office. The first part read as follows: “6/22/11: Begin Zoom starting [value] lower arch D2, max arch posteriors A1—[patient] has veneers/crown 6-11 tried in [patient’s] trays—[previously] done at another DDS, max tray does not fit properly—[advised] need for new tray—offered to take [impression]—[patient] not concerned [with] color of max teeth. ‘Does not have a

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form for dentists on how to administer Zoom whitening.<sup>11</sup> The plaintiff's counsel asked Katz: "And did you, in coming to your opinion that the standard of care was not violated by Dr. Regenstein in his response to the problems that are set forth here, you considered all of these facts as stated in the record?" After Katz stated yes, the plaintiff's counsel then asked him: "In coming to your opinion that Dr. [Regenstein] did not violate the standard of care, did you take these facts as true?" The defendants' counsel objected on multiple grounds, including that the plaintiff's counsel was "making a closing argument" because she was asking Katz to opine on the "[v]eracity of [the] evidence," the question was "inappropriate," and that the question was "not within the scope of direct examination . . . ." The court sustained the objection.<sup>12</sup>

"As a rule, the extent of a cross-examination is within the court's discretion, although it should be liberally allowed. . . . Nonetheless, the court may restrict a cross-examination to evidence which is competent, material, and relevant, and when the examination has been carried as far as will serve to develop the issues involved and aid the search for the truth, we approve

wide smile and can't see that far back.' [Patient] very concerned about [sensitivity]—used Sensodyne 2 [weeks] prior to today—[dispensed] 800 mg Motrin prior to Zoom. Completed 2 full cycles and 2 [minutes] into 3rd cycle—[experienced] [too] many zingers and is very uncomfortable—wanted to stop. [Advised] may [experience] Zingers for next 24 [hours]. [Advised] [r]elief gel, Sensodyne, ACT Rinse and Motrin." The second part read as follows: "6/22/11: [Patient] called—I have so much discomfort, I can't even open my mouth. I'm ready to leave work.' [Advised] to stay [with] Motrin/Advil every 6 [hours]—[Patient] states she took 600 mg 1 [hour] ago. [Advised] to utilize the relief gel as well as ACT Rinse and also to continue use of Sensodyne. [Advised] may be uncomfortable for next 24 hours. Per [patient] 'there is no way I can.'"

<sup>11</sup> The plaintiff's counsel did not indicate which sections of the form he was referencing.

<sup>12</sup> The court did not indicate upon which ground or grounds it sustained the objection.

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of the trial court curtailing the length and the limit of examinations.” (Internal quotation marks omitted.) *State v. Ballas*, 180 Conn. 662, 676, 433 A.2d 989 (1980).

We conclude that the court did not abuse its discretion in sustaining the objection by the defendants’ counsel. Although we are cognizant of the fact that experts are permitted to testify about the materials on which they rely in forming expert opinions; see *Carusillo v. Associated Women’s Health Specialists, P.C.*, supra, 72 Conn. App. 88; the plaintiff’s counsel did not ask Katz to explain the content of the sources, but, rather, the plaintiff’s counsel asked him to state whether he thought those sources were factually accurate. It is difficult to imagine an expert conceding that he or she relied upon an unreliable source in rendering an opinion. In any event, although another judge might have handled this evidentiary issue differently, we are not persuaded that the court abused its discretion in limiting the plaintiff’s cross-examination of Katz.

### III

The plaintiff’s third claim is that the court abused its discretion in not permitting Mogelof to answer a hypothetical question posed by the plaintiff’s counsel. She argues that the jury did not find that the defendants breached the standard of care in her dental malpractice claim, in part, because the hypothetical was “her opportunity to present to the jury her claim that the defendants had deviated from the applicable standard of care,” and its exclusion forced the jury to “disregard Dr. Mogelof’s expert testimony . . . .” We disagree.

During the plaintiff’s direct examination of Mogelof, her counsel asked him to answer the following hypothetical: “A patient has a known history of sensitivity . . . informs the dentist that she has clenching and grinding, that she suffers from migraines, that she suffers from anxiety, that she has acid reflux, and informs

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the dentist that she has very sensitive teeth and she had an uncomfortable experience in the past using bleaching trays and she came to the dentist for tooth whitening, and *the dentist went ahead with that procedure without conducting further history into her—further examination into her history of sensitivity*, did not provide her with an informed consent form, did not warn her about usage of contraindicated medication, and *did not warn her of the potential for exacerbated sensitivity and pain due to the procedure*. Could you say on this hypothetical within a reasonable degree of medical certainty that the standard of care for a dentist in 2011 would be violated?” (Emphasis added.) The defendants’ counsel objected on the ground that certain facts in the hypothetical were not supported by the evidence, specifically, that “the dentist went ahead with that procedure without conducting . . . further examination into her history of sensitivity,” and the dentist “did not warn her of the potential for exacerbated sensitivity and pain due to the procedure.” The court sustained the objection.

“[A]n expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert’s opinion. . . . [A]n expert may obtain information at trial by having factual testimony summarized in the form of a hypothetical question at trial.” (Citations omitted; internal quotation marks omitted.) *Viera v. Cohen*, 283 Conn. 412, 444, 927 A.2d 843 (2007). “An expert may give an opinion in response to a hypothetical question provided that the hypothetical question (1) *presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case*, (2) is not worded so as to mislead or confuse the jury, and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence.”

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(Emphasis added.) Conn. Code Evid. § 7-4 (c); see also *State v. David N.J.*, 301 Conn. 122, 133–34, 19 A.3d 646 (2011).

On the basis of our review of the record, we conclude that the court did not abuse its discretion in sustaining the defendants' objection. First, the court did not abuse its discretion in concluding that the phrase, "the dentist went ahead with that procedure without conducting . . . further examination into [the patient's] history of sensitivity," did not bear a true relationship to the evidence presented at trial. Regenstein testified that, during the June 2, 2011 consultation, he and the plaintiff discussed her medical history, specifically, her history of suffering from sensitive teeth, and he conducted an oral examination of her mouth in order to determine the cause of her sensitivity. The plaintiff testified that they "talked about the sensitivity in [her] teeth . . . a good amount" with both Regenstein and the dental hygienist during the June 2, 2011 consultation.

Second, the court did not abuse its discretion in concluding that the phrase "[the dentist] did not warn [the patient] of the potential for exacerbated sensitivity and pain due to the procedure" did not bear a true relationship to the evidence presented at trial. Regenstein testified that, at the June 2, 2011 consultation, he and the plaintiff discussed how she should expect to experience sensitivity after the procedure because she had a history of sensitive teeth. He also testified that they had a detailed discussion about how to lessen the sensitivity that she would feel, which included taking Motrin, using fluoride rinse, and using Sensodyne toothpaste in a tray<sup>13</sup> during the weeks prior to the procedure. Although the plaintiff testified that no one told her that Zoom whitening was a painful procedure or that she should

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<sup>13</sup> Regenstein testified that a tray is similar to a mouth guard, in which a patient puts toothpaste and puts the tray in his or her mouth for one-half an hour.

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use the trays, she also testified that either Regenstein or a dental hygienist explained to her that she could brush her teeth with Sensodyne toothpaste and take Motrin prior to the procedure in order to “alleviate any pain” that she may feel. The court, therefore, properly sustained the objection.<sup>14</sup>

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<sup>14</sup> As an alternative basis to affirm the judgment, on the basis of our review of the record, we agree with the defendants and conclude that, even if the court abused its discretion, any errors were harmless because the plaintiff failed to prove causation for her medical malpractice claim.

“[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard.” (Emphasis added; internal quotation marks omitted.) *Gold v. Greenwich Hospital Assn.*, 262 Conn. 248, 254–55, 811 A.2d 1266 (2002). “[T]he causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question. . . . [T]he expert opinion must be based on reasonable probabilities. . . . An expert, however, need not use talismanic words to show reasonable probability.” (Citations omitted; internal quotation marks omitted.) *Shegog v. Zabrecky*, 36 Conn. App. 737, 746, 654 A.2d 771, cert. denied, 232 Conn. 922, 656 A.2d 670 (1995).

The plaintiff was required to provide expert testimony to prove causation in her malpractice claim. See *id.*, 746–47 (explaining three exceptions to rule requiring expert testimony to prove causation). First, the effects that Zoom whitening may have on a patient with sensitive teeth are not obvious. See *Sherman v. Bristol Hospital, Inc.*, 79 Conn. App. 78, 89, 828 A.2d 1260 (2003) (effect morphine may have on patient with heart condition not obvious). Second, the evidence presented at trial did not create a probability that was so strong that a lay juror could form a reasonable belief that the plaintiff’s injuries were caused by the Zoom whitening procedure. See *Shegog v. Zabrecky*, *supra*, 36 Conn. App. 747. Although the plaintiff testified that her teeth sensitivity had significantly increased after the Zoom whitening procedure, she also testified that she suffered from sensitivity prior to the procedure and that she suffered from other ailments prior to the procedure, such as teeth grinding. Third, and finally, we do not believe that the present case involves gross negligence. Cf. *Puro v. Henry*, 188 Conn. 301, 307–308, 449 A.2d 176 (1982) (gross negligence when needle found in patient after hernia operation). Thus, expert testimony was required to prove causation for her dental malpractice claim.

Mogelof was the only expert who testified for the plaintiff. Although we are mindful that “talismanic words” are not required to prove causation;

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The judgment is affirmed.

In this opinion the other judges concurred.

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RICKY E. COSTA ET AL. v. PLAINVILLE BOARD OF  
EDUCATION ET AL.  
(AC 39204)

DiPentima, C. J., and Prescott and Flynn, Js.

*Syllabus*

The plaintiffs, M and her son R, sought to recover damages for negligence from the defendants, the town of Plainville, its board of education, and the town's high school principal. R, who was a high school student, sustained injuries during a basketball game at a school sponsored picnic, which was held during regular school hours at a facility off campus. The plaintiffs alleged that at the time of R's injury, no school personnel were present at or supervising the basketball court where the injury occurred. The trial court granted the defendants' motion for summary judgment on all counts of the plaintiffs' amended complaint on the ground of governmental immunity, concluding that the alleged conduct of the defendants involved a discretionary duty pursuant to statute (§ 52-557n [a] [2] [B]). The plaintiffs appealed to this court claiming that summary judgment was improper because issues of material fact existed

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(internal quotation marks omitted) *Shegog v. Zabrecky*, supra, 36 Conn. App. 746; Mogelof's testimony failed to support an argument for causation. Mogelof testified that, in his expert opinion, the defendants had breached the standard of care when treating the plaintiff and had failed to properly inform her of the known risks associated with Zoom whitening before obtaining her consent. The plaintiff's counsel, however, never asked him to opine on the issue of causation. Mogelof did not testify, on the basis of a reasonable medical probability, that there was a causal relation between the plaintiff's injuries and the Zoom whitening. In fact, Mogelof testified on cross-examination that he could not say without speculating that the plaintiff's upper teeth sensitivity was related to the Zoom whitening. He also never gave an opinion, through the process of elimination, on whether other factors, apart from the Zoom whitening, could have caused her injuries. Finally, he did not give his opinion through a hypothetical question because the plaintiff's counsel never asked him a hypothetical question pertaining to the issue of causation.

We need not determine whether the plaintiff proved causation for her lack of informed consent claim because, even if the court abused its discretion in its evidentiary rulings, the jury still found that the defendants' failure was not the proximate cause of her injuries.

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as to whether the defendants were entitled to immunity because their alleged acts and omissions were ministerial in nature and as to whether the identifiable person-imminent harm exception to governmental immunity applied. *Held* that the trial court properly rendered summary judgment in favor of the defendants as there was no genuine issue of material fact that the defendants were entitled to governmental immunity: although the plaintiffs suggested that the defendants' duty to supervise students during school sanctioned events such as the picnic was ministerial, the general safety guidelines and school board policies on which the plaintiffs relied did not constitute a clear directive that negated the need for the defendants to exercise judgment and discretion in providing adequate supervision; furthermore, the plaintiffs failed to demonstrate that R was an identifiable person for the purposes of the identifiable person-imminent harm exception to discretionary act immunity, as although schoolchildren who are on school property during school hours constitute a narrow, identifiable class of foreseeable victims, schoolchildren who voluntarily participate in nonmandatory school sponsored activities do not fall within that identifiable class, and here, R was neither required to attend the picnic nor to participate in the basketball game during which he was injured.

Argued May 18—officially released August 15, 2017

*Procedural History*

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Joseph M. Shortall*, judge trial referee, granted in part the defendants' motion to strike; thereafter, the complaint was withdrawn as to the defendant Jeffrey C. Kitching; subsequently, the court granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon; thereafter, the court denied the plaintiffs' motion to reargue, and the plaintiffs appealed to this court. *Affirmed*.

*Harold J. Geragosian*, for the appellants (plaintiffs).

*Beatrice S. Jordan*, for the appellees (named defendant et al.).

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*Opinion*

PRESCOTT, J. The plaintiffs, Ricky E. Costa, who suffered serious injury to his right eye during a pick-up basketball game at a Plainville High School senior class picnic, and his mother, Maria Costa, appeal from the summary judgment rendered on all counts in favor of the defendants, the town of Plainville (town), the town's Board of Education (board), and Steven LePage, Plainville High School's principal.<sup>1</sup> The plaintiffs claim that the court improperly rendered summary judgment on the basis of governmental immunity. The plaintiffs contend that the evidence presented raised a genuine issue of material fact regarding whether discretionary act immunity applied and whether Ricky Costa was an identifiable person for purposes of the identifiable person-imminent harm exception to governmental immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed material facts, as set forth by the trial court or gleaned from the summary judgment record, and procedural history are relevant to our resolution of the plaintiffs' claims. Plainville High School conducted its annual senior class picnic on June 17, 2011. The picnic occurred during regular school hours, but was held off campus at a YMCA campground facility in Burlington that includes a softball field, basketball court, and swimming pool. Students were not obligated to go to the picnic, but Ricky Costa voluntarily attended it and elected to participate in a pick-up basketball game in which he was injured. His injury occurred when another player poked him in the eye while they were attempting to get the ball.

LePage generally supervised the picnic along with several teachers and a school nurse, none of whom,

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<sup>1</sup> Jeffrey C. Kitching, Plainville's superintendent of schools, also was named as a defendant in the original complaint, but the action later was withdrawn as to him.

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however, was stationed near or monitoring the basketball court. Accordingly, no school personnel were present at or supervising the basketball court at the time the injury occurred. Prior to Ricky Costa's injury, no one had been injured at the picnic nor had any issue arisen regarding student behavior. Moreover, no behavioral issues or basketball related injuries had occurred at senior class picnics in prior years.

At the time of the picnic, the school board had in place a supervision policy that provided, *inter alia*, that school sponsored activities "must be well-planned and organized and must provide for the adequate supervision and welfare of participating students at all times." Guidelines for School Sponsored Activities and Organizations, Policy No. 6145.5 (2005).

The plaintiffs commenced the underlying action on June 13, 2013. The operative amended complaint was filed on July 14, 2015, and contained five counts. Counts one through three sounded in negligence and were brought by Ricky Costa against the board, the town, and LePage. Count four asserts a claim for damages against the board premised upon LePage's right to indemnification pursuant to General Statutes § 10-235.<sup>2</sup> Count five was brought by Maria Costa against the board and was derivative of the negligence claims of her son. She sought reimbursement for expenditures she made related to her son's medical care. The defendants filed an answer and special defenses, including that all counts were barred by governmental immunity.

The defendants later filed a motion for summary judgment, arguing that there was no genuine issue of material fact that Ricky Costa's negligence counts were

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<sup>2</sup> Although not at issue in the present appeal, we note that § 10-235 does not create "a direct cause of action allowing a person allegedly injured by a negligent employee of a board of education to sue the board directly." *Logan v. New Haven*, 49 Conn. Supp. 261, 873 A.2d 275 (2005).

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barred by governmental immunity; that Maria Costa's claim against the defendants was derivative of her son's negligence counts and, thus, was barred; and that the indemnification count failed as a matter of law. The plaintiffs filed a memorandum in opposition to the motion for summary judgment claiming that Ricky Costa fell within the identifiable person-imminent harm exception to governmental immunity and that the defendants were not entitled to governmental immunity because they breached a ministerial rather than discretionary duty to supervise students in their care. The motion was heard by the court, *Hon. Joseph M. Shortall*, judge trial referee, who subsequently issued a memorandum of decision on March 23, 2016, granting summary judgment on all counts in favor of the defendants. The court concluded as a matter of law that the alleged conduct of the defendants involved a discretionary duty for which they were entitled to governmental immunity and that Ricky Costa's voluntary participation in the picnic denied him status as an "identifiable person" for purposes of the identifiable person-imminent harm exception. This appeal followed.

"The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an

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evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case.” (Internal quotation marks omitted.) *Lamar v. Brevetti*, 173 Conn. App. 284, 288–89, A.3d (2017).

Having thoroughly reviewed the summary judgment record, the briefs of the parties, and the applicable law, we conclude that the court properly rendered summary judgment in favor of the defendants with respect to the entirety of the complaint.

First, the court properly determined that the defendants’ alleged negligent acts or omissions were discretionary in nature and not ministerial acts.<sup>3</sup> General Statutes § 52-557n, which generally abrogated common-law governmental immunity, “distinguishes between discretionary acts and those that are ministerial in nature, with liability generally attaching to a municipality [or its agents] only for negligently performed ministerial acts, not for negligently performed discretionary acts.” *DiMiceli v. Cheshire*, 162 Conn. App. 216, 224, 131 A.3d 771 (2016). Moreover, “[t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions.” *Bonington v. Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). Although the plaintiffs suggest that the defendants’ duty to supervise students during school sanctioned events such as the senior picnic was ministerial rather than discretionary in nature, the plaintiffs rely upon general safety guidelines and school board policies that, while requiring adequate supervision of students, fail to prescribe the precise nature or scope of such supervision or the manner in which it

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<sup>3</sup> It is unclear from the plaintiffs’ brief on appeal whether they have raised as a claim that the court improperly determined that the defendants were entitled to discretionary act immunity. When asked at oral argument, the plaintiffs’ attorney was equivocal at best.

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should be carried out. In other words, the plaintiffs have cited no clear directive that negated the need for the defendants to exercise judgment and discretion in providing adequate supervision. See *Violano v. Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006).

Second, the plaintiffs failed to demonstrate that there was a genuine issue of material fact as to whether the identifiable person-imminent harm exception to discretionary act immunity applied under the facts of the present case. Specifically, the plaintiffs failed to demonstrate that a genuine issue of material fact existed as to whether Ricky Costa was an “identifiable person” for purposes of the exception. The identifiable-person imminent harm exception “applies [if] the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This exception has three elements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . This exception is applicable only in the clearest cases.” (Citations omitted; internal quotation marks omitted.) *Jahn v. Board of Education*, 152 Conn. App. 652, 661–62, 99 A.3d 1230 (2014).

“In *Burns* [*v. Board of Education*, 228 Conn. 640, 649–50, 638 A.2d 1 (1994)], the court recognized school-children who are on school property during school hours as one identifiable class of foreseeable victims. . . . This class has been consistently recognized by the courts of our state as narrowly drawn.” (Citation omitted.) *Jahn v. Board of Education*, *supra*, 152 Conn. App. 662. The plaintiffs’ only argument in support of its claim that Ricky Costa was an identifiable person was that he belonged to the identifiable class of school-children recognized in *Burns*. In *Jahn*, however, this court held that school children who *voluntarily* participate in nonmandatory school sponsored activities do

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not fall within the identifiable class recognized in *Burns*. Id., 667–68. Accordingly, the student in *Jahn*, who was injured during an extracurricular swim meet, did not qualify as an identifiable person.

Here, it is undisputed that Ricky Costa was not required to attend the senior picnic, but did so voluntarily. He also voluntarily participated in the pick-up basketball game in which he was injured. We agree with the trial court that Ricky Costa’s voluntary participation did not grant him the status of an identifiable person entitled to protection by school authorities.<sup>4</sup>

In sum, the defendants’ duty to supervise the picnic was discretionary in nature, and Ricky Costa did not qualify as an identifiable person for purposes of the identifiable person-imminent harm exception. Accordingly, the court properly determined that the defendants were entitled to governmental immunity and granted summary judgment as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

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STATE OF CONNECTICUT v. JAMES RAYNOR  
(AC 38348)

DiPentima, C. J., and Sheldon and Flynn, Js.

*Syllabus*

Convicted of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to support his conviction. The defendant’s conviction stemmed from an incident in which the victim was beaten by a group of five men and shot in the back by J, a fellow gang member with the defendant. The defendant

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<sup>4</sup> Because we agree that Ricky Costa was not an “identifiable person” for the purpose of this exception to governmental immunity, we do not consider whether the court also correctly determined that he was not subjected to “imminent harm.”

claimed that the evidence supported a finding that he was not present when the victim was shot, and that even if the jury found that he was present, there was no testimony establishing that he verbally ordered the shooting, encouraged J or provided J with the gun used in the shooting. He also claimed that his mere presence at the scene of the crime could not establish his liability as an accessory to the assault. *Held:*

1. The evidence was sufficient to support the defendant's conviction of assault in the first degree as an accessory, there having been sufficient evidence for the jury to have found beyond a reasonable doubt that the defendant aided J to cause the victim physical injury by discharge of a firearm: there was ample evidence from which the jury reasonably could have found that the defendant was present for the shooting of the victim, and from which it could have inferred that the defendant was armed with a gun, that he aided J by preventing the victim from leaving the immediate area and that the defendant participated in the physical beating of the victim immediately prior to the shooting, which belied the defendant's claim that he was merely present for the shooting; furthermore, there was sufficient evidence for the jury to have found, beyond a reasonable doubt, that the defendant intended that J commit assault in the first degree, as the evidence showed that the defendant, who was an enforcer for the gang, had the ability and motive to order other gang members to shoot rival drug dealers, including the victim, who was selling drugs at the time of the shooting, and that the defendant intentionally played an active and authoritative role in causing other gang members to come to the scene, to confront and ultimately to shoot the victim to deter him and others from selling drugs without the gang's permission in that area.
2. The defendant's conviction of conspiracy to commit assault in the first degree was supported by sufficient evidence, as the jury reasonably could have found that the defendant had entered into an agreement to commit assault in the first degree; the jury could have inferred from the evidence that the defendant, as an enforcer for the gang, was expected, and thus had a motive, to use force against unsanctioned drug dealers operating in the gang's area, including the victim, that the defendant had the motive to agree with other gang members to cause physical injury to the victim by means of the discharge of a firearm, that he played an active role in the planning and coordination of the assault of the victim and had arranged where the group would rendezvous after the assault was completed, and that he intended that a member of the conspiracy would cause physical injury to the victim by means of the discharge of a firearm, in light of testimony by witnesses that the defendant and two other gang members were armed with guns and the fact that the defendant did not summon medical assistance for the victim.
3. The trial court did not abuse its discretion by admitting into evidence certain uncharged misconduct evidence concerning the practices of the

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defendant's gang in selling drugs and enforcing its control over the drug trade in its territory, and regarding a shooting of another drug dealer, C, approximately eighteen hours after the victim was shot and in the same vicinity as the victim's shooting, which was admitted as evidence of the defendant's motive to use force and violence against the victim: this court declined to review the defendant's claim that the trial court abused its discretion by admitting the uncharged misconduct drug evidence because it was not relevant to his motive or intent to harm the victim, or to conspire with or to aid others to do so, the defendant having failed to preserve that claim by objecting to the admission of that evidence on the ground of relevance or its prejudicial effect, and having failed to seek review of his unpreserved claim pursuant to *State v. Golding* (213 Conn. 233), or the plain error doctrine; moreover, the defendant's challenge to the admission of the uncharged misconduct evidence concerning the shooting of C was unavailing, as the defendant's claim that the evidence should not have been admitted because it was not relevant to his motive or intent to commit the charged offenses was not reviewable because he failed to object specifically on the ground of relevance to the admission of that evidence at trial, and, further, the trial court did not abuse its discretion in determining that the probative value of the evidence of C's shooting outweighed its prejudicial effect, as the defendant had reasonable grounds to anticipate the evidence, he was not unfairly surprised by the state's offer of the evidence at trial, the parties did not spend an undue amount of time addressing the evidence, it did not unduly distract the jury from the issues in the case, and the court took adequate measures to minimize its emotional impact on the jury.

4. The record was inadequate to review the defendant's claim that his constitutional rights were violated when the state used a peremptory challenge to strike a minority juror, R, without providing a sufficient race neutral explanation, in violation of *Batson v. Kentucky* (476 U.S. 79); the defendant did not preserve his claim of disparate treatment before the trial court, nor did he satisfy the requirements for review of the unpreserved claim under *State v. Golding* (213 Conn. 233), as the transcripts of the voir dire did not indicate the racial composition of the empaneled jury, and the record belied his assertion that there were adequate facts of record to demonstrate that the state, which excused R due to his employment history, engaged in racially disparate treatment by accepting other venirepersons, I and G, whom the defendant claimed were nonminority venirepersons with work restrictions similar to those of R; moreover, the trial court expressly noted that R was not of the same race as the defendant, there was nothing in the record demonstrating the personal race or ethnicity of R or I, and because the court expressly noted that G was an African-American female, the prosecution's acceptance of G but not R could not serve as evidence of the state's discriminatory use

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of peremptory challenges to exclude similarly situated minority persons from the jury.

Argued April 11—officially released August 15, 2017

*Procedural History*

Substitute information charging the defendant with the crimes of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey, J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict of guilty; subsequently, the court denied the defendant's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

*Alice Osedach*, assistant public defender, for the appellant (defendant).

*Timothy J. Sugrue*, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Opinion*

SHELDON, J. The defendant, James Raynor, appeals from the judgment of conviction rendered against him following a jury trial on charges of accessory to assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5)<sup>1</sup> and 53a-8,<sup>2</sup> and conspiracy to commit

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<sup>1</sup> General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm."

<sup>2</sup> General Statutes § 53a-8 (a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

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assault in the first degree in violation of General Statutes §§ 53a-48<sup>3</sup> and 53a-59 (a) (5). On appeal, the defendant claims that (1) there was insufficient evidence to sustain his conviction as an accessory to assault in the first degree; (2) there was insufficient evidence to sustain his conviction of conspiracy to commit assault in the first degree; (3) the trial court abused its discretion in admitting uncharged misconduct evidence as evidence of the defendant's motive and intent to commit the crimes charged against him in this case; and (4) the court improperly denied the defendant's *Batson*<sup>4</sup> challenge to the state's exercise of a peremptory challenge during jury selection. We affirm the judgment of the trial court.

The jury was presented the following facts upon which to base its verdict. On the morning of July 24, 2009, Luis Torres (victim) traveled to 10 Liberty Street in Hartford to purchase heroin from an acquaintance, Alex Torres (Torres). At that time, Torres had known the victim for approximately nine months. Torres testified that on several prior occasions he had sold the victim small amounts of heroin, but on this occasion, for the first time, the victim purchased a large quantity of heroin, a total of 100 bags. When the victim was making this purchase, he told Torres that he intended to sell the drugs in front of the 24 Hour Store near the intersection of Albany Avenue and Bedford Street in Hartford. Upon hearing this, Torres told the victim "to be careful because it's . . . a bad neighborhood" and that he should "stay away from [that] area." After the victim made his purchase, he parted company with Torres and left Liberty Street.

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<sup>3</sup> General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

<sup>4</sup> See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Later that evening, the victim drove to New Britain and picked up his girlfriend's father, Miguel Rosado. Thereafter, in the early morning hours of July 25, 2009, the two men went to the 24 Hour Store on Albany Avenue to purchase beer and food. Upon arriving at the 24 Hour Store, Rosado and the victim spoke with two women, Adrienne Morrell and Karline DuBois, whom they believed to be prostitutes. After learning that they were not prostitutes, Rosado and the victim asked the women whether they could help them purchase "powder," or powder cocaine. Morrell and DuBois agreed, then got into the victim's car and directed the men to Irving Street in Hartford, where the victim purchased an unspecified quantity of cocaine. The four then returned to the 24 Hour Store in the victim's car.

Upon returning to the 24 Hour Store, the victim displayed a bag of heroin to DuBois and asked her if she knew "where he could get rid of it," from which DuBois understood him to mean that "[h]e wanted to sell it." DuBois informed the victim that she did not use heroin, and thus she did not know where the victim could sell his drugs. DuBois then stated that she was going "back upstairs" to the apartments above the 24 Hour Store, where local people often gathered to use drugs. The victim asked DuBois if he could join her, but DuBois warned him that he should stay downstairs because "[p]eople don't know you . . . ." Ignoring this warning, the victim stated that he was going to go upstairs with DuBois, to which she responded, "Then you're on your own."

Thereafter, the victim, Rosado, Morrell, and DuBois all went upstairs to the apartments above the 24 Hour Store. DuBois recalled that when they reached the apartments, six or seven people were already there, playing cards and getting high. After they entered, Morrell, DuBois and Rosado began to smoke crack cocaine.

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At the same time, the victim, who was very drunk, began offering heroin to the other occupants of the apartment. As DuBois had predicted, “[n]obody [in the apartment] wanted anything to do with [the victim] because nobody knew him.” Shortly after the victim’s arrival, a group of three men entered the apartment. DuBois recognized two of the three men as Altaurus Spivey, whom DuBois knew as “S,” and Joseph Ward, whom she knew as “Neutron.” Although DuBois did not identify the third man by name, she described him as a “bigger black guy.”

Upon entering the apartment, the three men approached the victim, and S asked, “What are you doing here?” DuBois agreed with the prosecutor’s statement that S spoke to the victim “in a tough guy type of way,” which she interpreted to mean, “you don’t belong up here. . . . [Y]ou’re not going to get rid of nothing. Nobody knows you. Just go.” DuBois recalled feeling a growing tension between the groups and fearing that “there was going to be a big problem.” Thereafter, according to DuBois, S and his group left the apartment, followed a few minutes later by the victim and an unidentified female, who went downstairs together and outside through the back door of the building to the area behind the 24 Hour Store. As this was occurring, at approximately 2 a.m., Dubois, Rosado, and Morrell remained inside the apartment.

Several witnesses testified that the 24 Hour Store was often busy at and after 2 a.m. because it was the only store in the area that was open at that time. People would therefore go there to purchase food and drinks after the nearby bars and clubs had closed for the evening. Indeed, Officer Steven Barone of the Hartford Police Department testified that the 24 Hour Store was known by law enforcement as a “nuisance spot,” where there was always a high volume of foot traffic and criminal activity between 2 and 4 a.m. Consistent with Barone’s testimony, several witnesses stated that many

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people were both inside and outside of the 24 Hour Store in the early morning hours of July 25, 2009.

One regular patron, Marc Doster, who lived on Albany Avenue in an apartment adjacent to the 24 Hour Store, was familiar with people who lived in or frequented the area around Bedford Street and Albany Avenue, including the defendant, who was known on the streets as “Ape.” Doster testified that, in the early morning of July 25, 2009, as he was walking from his apartment to the 24 Hour Store, he was approached by the defendant, who asked him if he either knew or was affiliated with the man who was selling drugs behind the 24 Hour Store. Doster stated that he did not. The defendant then told Doster, “don’t worry about it,” because he was going “to pay [the man] a visit . . . talk to him.” Doster then recalled that, just minutes after this conversation, he saw someone with a gun in his hand running toward the back of the 24 Hour Store. Although Doster could not see the face of the man with the gun because the man was wearing black clothing and had covered his face, he observed that the man was short and heavyset, with a body size and shape that resembled the defendant.

As these events were transpiring, another regular patron of the 24 Hour Store, Tyrell Mohown, who had met the victim for the first time that evening, entered the store and purchased a cigar so that he and the victim could smoke marijuana together. After making his purchase, however, when Mohown went behind the 24 Hour Store to meet the victim, he saw the victim surrounded by five men, including Neutron and John Dickerson, nicknamed “Jerk.” Mohown testified that although he did not see the defendant or S in that group, he recalled that at least two of the five men had covered their faces with bandanas. Shortly after he came upon the scene, Mohown saw Neutron strike the victim with a baseball bat several times in the upper body. The

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other men then began punching and kicking the victim, who collapsed on the ground. Mohown then saw Jerk take out a gun and fire one round into the victim's back before the group scattered in different directions. The victim, still conscious but unable to walk, stated that he thought he was about to die and asked Mohown to call an ambulance. Mohown returned to the 24 Hour Store and used a pay phone to report the shooting but, not wanting to get involved, did not identify the shooter.

Another witness, Sonesta Reynolds-Campos (Campos),<sup>5</sup> was standing on Bedford Street near the 24 Hour Store when she heard a gunshot from the area behind the store. Upon hearing the gunshot, Campos directed her attention to that area, where she saw a group of approximately six men. Campos recalled that S, Jerk, Neutron, and the defendant were all in the group, and that the defendant was then wearing a hoodie and holding what appeared to be a gun.

At approximately 2:25 a.m., the Hartford police received reports of gunshots fired near the intersection of Bedford Street and Albany Avenue. Within minutes of receiving such reports, several Hartford police officers responded to the scene. Officer Barone, one of the first officers to respond, made efforts to secure the scene while other officers tended to the victim. At that time, officers saw multiple lacerations on the victim's face and discovered a single gunshot wound to his back. The victim was then transported to a hospital, where it was determined that the bullet had struck his spine, paralyzing him. Due to the inherent complications of removing the bullet from the victim's spine, physicians were unable to remove the bullet, and thus officers

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<sup>5</sup> Throughout the course of the trial, the witness was referred to as Sonesta Reynolds, Sonesta Campos, and Sonesta Reynolds-Campos. Because the witness indicated no preference as to how she was addressed, we refer to her simply as Campos.

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were unable to conduct forensic testing on the bullet at that time.<sup>6</sup>

Several days after the shooting, Campos encountered the defendant on Bedford Street. During that encounter, the defendant told Campos, “[I’m] sorry you had to see it,” but “[I] had to make an example of him.” Although Campos did not ask the defendant what he meant by those remarks, she interpreted them to refer to the recent shooting of the victim behind the 24 Hour Store.

On January 7, 2014, at the conclusion of a lengthy investigation of the July 25, 2009 shooting by a state investigating grand jury,<sup>7</sup> the defendant was arrested in connection with the shooting. Thereafter, by way of a long form information, the state charged the defendant with conspiracy to commit assault in the first degree and with being an accessory to assault in the first degree, on which he was later brought to trial before the court, *Mullarkey, J.*, and a jury of six. The state presented its case-in-chief on November 7, 10, and 12, 2014. On November 12, at the conclusion of the state’s case-in-chief, the defendant moved for a judgment of acquittal on both charges. That motion was denied by the court. On November 17, 2014, the jury returned a verdict of guilty on both charges. The following week, on November 21, 2014, the defendant filed a motion to set aside the verdict on the grounds that the verdict was against the weight of the evidence and that the court abused its discretion in admitting evidence of uncharged misconduct. The defendant’s motion was subsequently denied by the court. On February 5, 2015, the defendant was sentenced to a total effective term

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<sup>6</sup> Prior to trial, the victim died due to an unrelated drug overdose. Following the victim’s death, police were able to remove and analyze the bullet that had struck the victim’s spinal cord. See part II B of this opinion. As part of its evidentiary rulings, the court excluded any reference to the victim’s death.

<sup>7</sup> The jury did not, at any time during the defendant’s criminal trial, receive evidence concerning or related to the state investigating grand jury.

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of thirty-seven years of incarceration to be followed by three years of special parole. Thereafter, the defendant filed the present appeal. Additional facts will be set forth as necessary.

## I

## SUFFICIENCY OF THE EVIDENCE

On appeal, the defendant claims that there was insufficient evidence to sustain either his conviction of accessory to assault in the first degree or his conviction of conspiracy to commit assault in the first degree.<sup>8</sup> We are not persuaded.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts.<sup>9</sup> In July, 2009, the area surrounding Bedford and Brook Streets was under the control of Money Green Bedrock (MGB), a neighborhood street gang. MGB was known to traffic in and sell drugs, including heroin and crack cocaine, throughout the area. Members of MGB included, inter alia, S, Neutron, Jerk, and the defendant. Campos testified that she routinely purchased drugs from the defendant for her own use, and was often asked to “test” the purity of the gang’s heroin. As a

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<sup>8</sup> “We address the defendant’s sufficiency of the evidence claim before we address any other claims because if a defendant prevails on such a claim, the proper remedy is to direct a judgment of acquittal.” *State v. Holley*, 160 Conn. App. 578, 584 n.3, 127 A.3d 221, cert. granted on other grounds, 127 A.3d 1000 (2015); see also *State v. Moore*, 100 Conn. App. 122, 126 n.2, 917 A.2d 564 (2007).

<sup>9</sup> On appeal, the defendant asserts that the court abused its discretion in admitting evidence of uncharged misconduct. In reviewing a sufficiency of the evidence claim, however, we look at “no less than, and no more than, the evidence introduced at trial.” (Internal quotation marks omitted.) *State v. Chemlen*, 165 Conn. App. 791, 816–18, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016). Thus, although we address the defendant’s evidentiary claims in part II of this opinion, our review of the defendant’s sufficiency claim necessarily includes our consideration of the uncharged misconduct evidence admitted at trial and the inferences the jury reasonably could have drawn therefrom.

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result of these activities, Campos became acquainted with the defendant and familiar with the defendant's role within MGB, and gained his trust.

According to Campos, only members of MGB were permitted to sell drugs in the area around Bedford Street, and drug dealers who did not live in the area were not allowed to do business in the area. In order to enforce their control over this territory, the members of MGB shared certain duties, including conducting drug sales, acting as lookouts, and monitoring the area to make sure no one from outside the group was "hustling on the block . . . ." Several witnesses testified that the defendant had a position of authority within MGB, and was considered an "enforcer" for the gang. According to one witness, Ladean Daniels, the defendant "gave orders, and the people who [are] in that area abide by them." Similarly, Doster testified that the defendant would "handle problems . . . [p]atrol the area . . . [and] [e]nforce the rules . . . ."

As a result of the gang's assertion of control over drug selling activity in the Bedford Street area, several witnesses, who were also admitted drug dealers, testified that they either did not sell drugs in that neighborhood, because they were not from there, or that they were permitted to sell drugs on MGB's turf because they lived in the neighborhood. Drug dealers in the latter group, including Daniels,<sup>10</sup> operated in the area with the understanding that they would either pay MGB a portion of their profits or purchase the drugs they sold directly from the gang. According to DuBois, it was known throughout the neighborhood that drug dealers

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<sup>10</sup> Daniels testified that he was allowed to sell drugs in the neighborhood because he had lived in the area of Bedford Street for approximately eleven years, he "was cool with some of the friends of the defendant," and there was an understanding that "[i]f [he] was the hustler on that block, [he] had to be buying [MGB's] drugs."

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who did not abide by these rules would be “dealt with” by MGB.

The state introduced testimony from several witnesses to the shooting of the victim behind the 24 Hour Store on July 25, 2009. In the state’s case-in-chief, Rosado testified that, when he and the victim returned to the 24 Hour Store from Irving Street, he saw the victim speak with a man known as S, whom the victim claimed to have known from the area. Although Rosado could not remember the exact words that the victim used, he recalled the victim saying that he intended either to purchase marijuana from S or to sell some marijuana to S that night. The jury also heard testimony from Mohown, who stated that he had met the victim for the first time on the evening prior to the shooting and that, prior to the shooting, he had agreed to smoke marijuana with the victim behind the 24 Hour Store.

Doster testified, as previously noted, that, “a couple minutes before . . . the incident happened,” the defendant approached him and asked him if he knew or was associated with the man who was selling drugs behind the 24 Hour Store. When Doster said that he did not know the man, the defendant informed him that he was “going to go talk to [that man] and handle it.” Doster further testified that, shortly after he and the defendant had that conversation, he saw someone who resembled the defendant running toward the back of the 24 Hour Store holding a gun. Furthermore, Campos testified that, upon hearing gunshots, she observed the defendant standing near the victim, wearing a hoodie and holding a gun. This testimony was corroborated by Daniels, who also claimed to have been near the 24 Hour Store in the early morning hours of July 25, 2009. Daniels stated that, although he did not see who shot the victim, he walked behind the store after hearing gunshots in the area and, at the time, saw the defendant and another

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man nicknamed “Hollywood” holding guns and standing near the victim, who was lying on the ground. Additionally, several witnesses testified that the group of men who had surrounded the victim during the incident scattered and ran away in different directions after the victim was shot.

Daniels further testified that, when he reencountered the defendant near the 24 Hour Store minutes after the shooting and asked him what had happened, the defendant stated, “[d]ude keep coming in the area trying to hustle.” Daniels also testified that, after he had returned to the 24 Hour Store and purchased a sandwich, he walked to an apartment building on Brook Street, which runs parallel to Bedford Street. As he arrived at the apartment building, Daniels came upon the group of men he had seen surrounding the victim behind the 24 Hour Store. According to Daniels, the defendant, Jerk, S, and another man were gathered in the yard behind the apartment building. At that time, Daniels overheard the defendant tell the men “to stay off the block and keep their eyes open because that was their work,” then warning them to be careful because “the block was hot.” Finally, Campos testified that when she spoke with the defendant several days after the shooting, he apologized to her for her having to witness the shooting, but explained to her that he “had to make an example of him.”

In addition to this evidence, the state introduced, as part of its case-in-chief, evidence of the defendant’s involvement, later on that same day, in arranging the shooting of another drug dealer who was selling drugs without permission on MGB’s turf.<sup>11</sup> This evidence was offered, over the defendant’s objection, to prove his

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<sup>11</sup> On appeal, the defendant asserts that the court abused its discretion in admitting this evidence of uncharged misconduct. See footnote 9 of this opinion. We address those arguments in part II of this opinion.

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motive and intent to participate in the earlier shooting of the victim behind the 24 Hour Store. On the basis of that evidence, the jury reasonably could have found that, on the night of July 25, 2009, approximately eighteen hours after the victim in this case was shot, another drug dealer, Kenneth Carter, was shot multiple times in the chest on Liberty Street in Hartford, approximately one block away from Bedford Street.<sup>12</sup> After the police had secured the scene of the later shooting, officers recovered, from the interior of Carter's vehicle, a large clear bag filled with small, individually wrapped packages of a green, leafy substance suspected of being marijuana. The officers also found and lifted several latent fingerprints from the outside of the driver's side door of Carter's vehicle. When those fingerprints were entered into the AFIS<sup>13</sup> database, they were found to match known fingerprints on file for Kendel Jules, nicknamed "Jock," who was a known affiliate of MGB.

Thereafter, Sergeant Andrew Weaver of the Hartford Police Department testified to his analysis of the cell phone records associated with the cell phones of Carter, the defendant, and Jock.<sup>14</sup> Weaver testified that the cell phone records revealed that the defendant had initiated contact with Carter at 10:10 p.m. that evening and had called him several times over the next thirty minutes, including one call at 10:39 p.m., approximately ten minutes before Carter was shot. Weaver also testified that a call had been placed from the defendant's cell phone to Jock's cell phone approximately seven minutes before Carter was shot. On the basis of his

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<sup>12</sup> Although Carter died as a result of his wounds, the court excluded from the trial any reference to Carter's death, and the state was prohibited from referring to the shooting as a murder or homicide.

<sup>13</sup> AFIS stands for automated fingerprint identification system.

<sup>14</sup> On direct examination, Weaver testified that between 2004 and 2014, he had received extensive forensics training in "[analyzing] cellular phones, cellular mapping . . . [and] computer forensics." The defendant did not object either to Weaver's credentials or the substance of his testimony.

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analysis of such call records and the associated cell phone tower, Weaver testified that, at the time of the defendant's final call to Jock before the Carter shooting, Jock's cell phone was in the area of Liberty Street, moving in the general direction of the location of Carter's vehicle.

Thereafter, the state presented additional testimony from Daniels, who claimed that he had been present for a conversation between the defendant, Jerk, and Jock in the days following the Carter shooting. Daniels testified that on that occasion, he had gone to the defendant's apartment on Bedford Street to purchase drugs. He further testified that, within three or four minutes of his arrival, the defendant and Jerk began "mocking [Jock about] how he was nervous and afraid when he was supposed to shoot the dude." Although Daniels did not know who the group was referring to, the defendant indicated that the person who was shot "[kept] coming down [here] hustling and he was meeting people in that back street." Daniels also testified that the three men described how they had split up and deployed themselves before the Carter shooting. According to Daniels, the defendant patrolled the area of Garden Street to make sure the coast was clear, while Jock walked to Liberty Street and Jerk positioned himself on Brook Street. The defendant also said that the shooting was "[Jock's] initiation into the block" and that "if Jock [couldn't] get the job done, Jerk was [there] to help . . . ."

With these additional facts in mind, we turn to our standard of review. "It is well settled that a defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . [F]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and no more than, the evidence introduced

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at trial. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

“[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

“[O]n appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether

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there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Citation omitted; internal quotation marks omitted.) *State v. Chemlen*, 165 Conn. App. 791, 816–18, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016). "[T]he trier of fact may credit part of a witness' testimony and reject other parts. . . . [W]e must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude . . . ." (Internal quotation marks omitted.) *State v. Grant*, 149 Conn. App. 41, 46, 87 A.3d 1150, cert. denied, 312 Conn. 907, 93 A.3d 158 (2014).

With these legal principles in mind, we address each the defendant's sufficiency claims.

#### A

##### Accessory to Assault in First Degree

The defendant first claims that there was insufficient evidence to sustain his conviction as an accessory to assault in the first degree in violation of §§ 53a-59 (a) (5) and 53a-8. "It is well established in this state that there is no such crime as being an accessory. . . . Rather, the accessory statute, General Statutes § 53a-8, merely provides an alternative theory under which liability for the underlying substantive crime may be proved." (Citation omitted; internal quotation marks omitted.) *State v. Hopkins*, 25 Conn. App. 565, 568–69, 595 A.2d 911, cert. denied, 220 Conn. 921, 597 A.2d 342 (1991). "[Section] 53a-8 (a) provides: A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender." (Internal

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quotation marks omitted.) *State v. Hines*, 89 Conn. App. 440, 447, 873 A.2d 1042, cert. denied, 275 Conn. 904, 882 A.2d 678 (2005). To convict a defendant of a crime on the theory of accessorial liability under this statute, the state must prove both that a person other than the defendant acting as a principal offender, committed each essential element of that crime, and that the defendant, acting with the mental state required for the commission of that crime, solicited, requested, commanded, importuned or intentionally aided the principal offender to engage in the conduct constituting that crime. “Since under our law both principals and accessories are treated as principals . . . if the evidence, taken in the light most favorable to sustaining the verdict, establishes that [the defendant] . . . did some act which . . . directly or indirectly counseled or procured any persons to commit the offenses or do any act forming a part thereof, then the [conviction] must stand.” (Internal quotation marks omitted.) *Id.*; see also *State v. Diaz*, 237 Conn. 518, 543, 679 A.2d 902 (1996). A person is guilty of assault in the first degree under § 53a-59 (a), as a principal offender, “when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm.” Thus, to prove a person guilty as a principal of assault in the first degree, the state must prove beyond a reasonable doubt that (1) the person caused physical injury to another person; (2) that he did so while acting with the intent to cause physical injury to the other person or a third person; and (3) that he caused such physical injury to the other person by means of the discharge of a firearm. See *State v. Collins*, 100 Conn. App. 833, 843, 919 A.2d 1087, cert. denied, 284 Conn. 916, 931 A.2d 937 (2007).

In light of those requirements of proof to establish a person’s guilt as a principal offender under § 53a-59 (a) (5), establishing a defendant’s guilt as an accessory

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to that offense under §§ 53a-59 (a) (5) and 53a-8 requires proof of the following essential elements: (1) that the principal offender violated § 53a-59 (a) (5) by causing physical injury to another person by means of the discharge of a firearm while acting with the intent to cause physical injury; (2) that the defendant solicited, requested, importuned or intentionally aided the principal offender to engage in the conduct by which he violated § 53a-59 (a) (5); and (3) that when the defendant intentionally aided the principal offender to engage in such conduct, the defendant was acting with the intent to cause physical injury to another person.

At the outset, we note that the parties agree that the victim was, in fact, physically injured by means of the discharge of a firearm by a principal offender other than the defendant, to wit; the defendant's fellow gang member, Jerk. They agree as well that, when Jerk shot the victim in the back after he and others had beaten and kicked him, he was committing the offense of assault in the first degree in violation of § 53a-59 (a) (5). The defendant argues, however, that there was insufficient evidence to sustain his conviction as an accessory to assault in the first degree because the state failed to prove beyond a reasonable doubt that, while acting with the intent to cause physical injury to the victim, he requested, commanded, or aided another to cause physical injury to the victim by means of the discharge of a firearm.

In support of his argument, the defendant asserts that at least one eyewitness, Mohown, had testified that the defendant was not present when the victim was shot. The defendant further argues that, even if the jury were to have credited other witnesses who placed him at the scene of the shooting, there was no testimony that the defendant verbally ordered the shooting, encouraged the shooter to shoot, or provided the shooter with the gun used in the shooting. The defendant thus argues

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that the evidence adduced at trial, even when viewed in the light most favorable to the state, proved that he merely was present when the shooting occurred, but that a person's mere presence at the scene of a crime does not, by itself, establish that person's liability as an accessory to the commission of that crime.

The state disagrees, asserting that the jury was given ample circumstantial evidence from which it reasonably could have inferred that the defendant solicited, ordered, and/or intentionally aided Jerk to assault the victim by discharging a firearm. In support of its position, the state relies, more particularly, upon the following evidence: that the defendant was affiliated with the MGB, a gang of drug sellers who attempted to control all drug selling activity in the area of Bedford Street and Albany Avenue; that the defendant was "an enforcer" of the gang's drug selling monopoly in the area; that the defendant had made statements to Doster before the shooting, indicating that he personally was "going to go talk to" the victim, whom he referred to as the man selling drugs behind the 24 Hour Store, and thereby "handle" the problem arising from the victim's unwelcome presence and activity on MGB turf; that several MGB members accosted the victim inside of the apartments above the 24 Hour Store shortly before the shooting; that the defendant, while armed with a gun, joined with several other MGB members in confronting and surrounding the victim just before he was beaten, kicked, and ultimately shot in the back; that the defendant made inculpatory statements to Daniels about the shooting just minutes after it occurred; and that the defendant made inculpatory statements to Campos days after the shooting, apologizing to her for her having witnessed the shooting but explaining why it had happened, specifically, that he needed "to make an example" of the victim. The state thus argues that the record is replete with evidence from which the jury reasonably

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could have found that the defendant was guilty as an accessory to the commission of assault in the first degree.

Viewing the evidence in the light most favorable to sustaining the conviction, we conclude that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant aided the principal shooter to cause the victim physical injury by discharge of a firearm, and thus to commit assault in the first degree. See *State v. Bennett*, 307 Conn. 758, 766, 59 A.3d 221 (2013). First, although the defendant's presence at the scene of the shooting is not a necessary factual predicate to accessorial liability, there was ample evidence from which the jury reasonably could have found that the defendant was present for the shooting of the victim. See, e.g., *State v. Conde*, 67 Conn. App. 474, 486, 787 A.2d 571 (2001) (“[o]ne may be an accessory even though he [was] not present” for commission of crime [internal quotation marks omitted]), cert. denied, 259 Conn. 927, 793 A.2d 251 (2002). Although Mohown claimed that he did not see the defendant in the group of men that attacked the victim that night, the defendant fails to recognize that the jury was free to “credit part of [Mohown's] testimony and reject other parts.” (Internal quotation marks omitted.) *State v. Grant*, supra, 149 Conn. App. 46. In that respect, the jury reasonably could have found that Mohown's testimony that at least two men in that group were wearing bandanas over their faces supported Doster's testimony that he saw someone whom he believed to be the defendant, with his face covered, running toward the back of the 24 Hour Store with a gun in his hand moments before the shooting occurred. See *State v. Allen*, 289 Conn. 550, 559, 958 A.2d 1214 (2008) (“[i]f there is any reasonable way that the jury might have reconciled the conflicting testimony before them, we may not disturb their verdict” [internal quotation marks omitted]). Furthermore, both

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Campos and Daniels testified that moments after the shooting, they observed the defendant standing near the victim, holding a gun. Thus, the jury reasonably could have found that the defendant was, in fact, present for the shooting of the victim.

The defendant maintains, however, that even if the jury found that he was present for the shooting, mere presence, by itself, is insufficient to support a finding that the defendant aided the principal offender. See, e.g., *State v. Conde*, supra, 67 Conn. App. 486. Although we agree with that general statement of law, the defendant overlooks that the jury reasonably could have credited the testimony of Doster, Campos, and Daniels, each of whom testified that the group of men surrounded the victim, the defendant was standing near the victim and holding a gun in his hand, and that, while S struck the victim with a bat, the other men punched and kicked the victim before he was shot. From this evidence, the jury reasonably could have inferred that the defendant was armed with a gun, prevented the victim from leaving the immediate area, and participated in the physical beating of the victim immediately prior to the shooting. Such an inference belies the defendant's claim that he was "merely present" for the shooting. To the contrary, it permits a reasonable inference that the defendant aided the principal by preventing the victim from leaving the area and, as a result of the physical beating, immobilizing the victim before he was shot in the back.

As discussed in the preceding paragraphs, however, the evidence must demonstrate not only that the defendant aided the principal, but that such aid was provided with "criminal intent and community of unlawful purpose with the perpetrator of the crime . . . ." (Internal quotation marks omitted.) *State v. Sargeant*, 288 Conn. 673, 680, 954 A.2d 839 (2008). "To act intentionally, the defendant must have had the conscious objective to cause the [desired result] . . . . Intent is generally

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proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . [T]he defendant's state of mind at the time of the shooting may be proven by his conduct before, during and after the shooting. Such conduct yields facts and inferences that demonstrate a pattern of behavior and attitude toward the victim by the defendant that is probative of the defendant's mental state." (Citation omitted; internal quotation marks omitted.) *State v. Bennett*, supra, 307 Conn. 766.

Viewing the evidence in the light most favorable to sustaining the conviction, we conclude that there was sufficient evidence for the jury to find, beyond a reasonable doubt, that the defendant intended that the principal commit assault in the first degree. First, the jury reasonably could have credited testimony that the defendant was an "enforcer" for MGB who held a position of authority within the gang. That testimony, combined with Daniels' testimony that the defendant stated that the Carter shooting was Jock's initiation into the gang and that Carter had been shot because he "[kept] coming down there hustling and . . . meeting people in that back street," supports an inference that the defendant had the ability and motive to order other members to shoot rival drug dealers, including the victim in this case. The jury also could have credited Doster's testimony that, minutes before the shooting, the defendant told him that he "was going to talk to [the man dealing drugs behind the 24 Hour Store] and handle it." Given the organization's motive to use deadly force against unwelcome drug dealers as a means of enforcing the gang's exclusive control over drug sales in the Bedford Street area, the jury reasonably could have inferred that the defendant's comments prior to the shooting in this case, in addition to the testimony that the defendant was holding a gun in his hand before the shooting, demonstrated the defendant's intent to use or to have

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someone else use a firearm to assault the victim. As discussed in the preceding paragraphs, “[t]he trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . .” (Citation omitted; internal quotation marks omitted.) *State v. Garner*, 270 Conn. 458, 472, 853 A.2d 478 (2004).

Finally, the jury heard evidence about inculpatory statements made by the defendant in the minutes and days following this shooting. For instance, Daniels testified that, minutes after the shooting, when he asked the defendant what had led to the shooting, the defendant responded, “[d]ude keep coming in the area trying to hustle.” Similarly, Campos testified that, several days after the shooting, the defendant made unsolicited statements to her, apologizing that she “had to see [that]” and explaining that “he had to make an example out of [the victim].” On the basis of such evidence, the jury reasonably could have found that the defendant intentionally played an active and authoritative role in causing other gang members to come to the scene, to confront the victim, and ultimately to shoot him to teach him and others the lesson that they were not to sell drugs without permission on MGB’s turf. Accordingly, viewing the evidence in the light most favorable to sustaining the conviction, the jury reasonably could have found that “the cumulative effect of all the evidence [proved] the defendant guilty of all the elements of the crime charged beyond a reasonable doubt.” (Internal quotation marks omitted.) *State v. Chemlen*, supra, 165 Conn. App. 817.

#### B

##### Conspiracy to Commit Assault in First Degree

The defendant next claims that there was insufficient evidence to sustain his conviction of conspiracy to com-

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mit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a) (5).

“To establish the crime of conspiracy, it must be shown that an agreement was made to [commit assault in the first degree], that the conspirators intended [the victim be physically injured by means of the discharge of a firearm] and that the agreement was followed by an overt act in furtherance of the conspiracy. . . . Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense.” (Internal quotation marks omitted.) *State v. Blaine*, 168 Conn. App. 505, 511, 147 A.3d 1044 (2016). “While the state must prove an agreement [to commit assault in the first degree], the existence of a formal agreement between the conspirators need not be proved because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts.” (Internal quotation marks omitted.) *State v. Grant*, supra, 149 Conn. App. 46–47. “[W]hen determining both a defendant’s specific intent to agree and his specific intent that the criminal acts be performed, the jury may rely on reasonable inferences from facts in the evidence and may develop a chain of inferences, each link of which may depend for its validity on the validity of the prior link in the chain. . . . Accordingly, the defendant’s state of mind may be proven by his conduct

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before, during and after the shooting.” (Citation omitted; internal quotation marks omitted.) *State v. Williams*, 94 Conn. App. 424, 433, 892 A.2d 990, cert. denied, 279 Conn. 901, 901 A.2d 1224 (2006).

On appeal, the defendant asserts that there was insufficient evidence to support the state’s theory that he “got the ball rolling” and agreed with the shooter to commit assault in the first degree. In support of this position, he argues that the record lacks any evidence that he entered into an agreement with the shooter, or that he ordered or encouraged the shooter to commit the crime of assault in the first degree. Moreover, the defendant contends that there was a substantial lapse of time between his alleged statement to Doster about “going to go talk to . . . and handle” the person behind the 24 Hour Store and the time of the shooting.<sup>15</sup> The defendant further asserts that his postshooting statements to Campos “did not prove that [he] had anything to do with the crime; they are simply statements expressing his opinion and are not inculpatory.” As such, the defendant argues that “it is just as likely [that] the defendant’s brother, who was also a ‘leader,’ or any other member [of MGB] who was an ‘enforcer,’ got the ‘ball rolling’ or conspired with the shooter.” The defendant thus argues that any inference that he conspired with the shooter was unreasonable and unsupported by the evidence, and that the jury’s verdict was the product of “speculation and conjecture.”

Viewing the evidence in the light most favorable to sustaining the conviction, we conclude that there was

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<sup>15</sup> In his brief to this court, the defendant maintains that Doster testified that his conversation with the defendant occurred hours, not minutes, before the shooting occurred. The transcripts demonstrate, however, that Doster expressly stated that his conversation with the defendant occurred “[m]aybe a couple minutes before . . . the incident happened.” Although Doster equivocated on this time line during cross-examination, it is the sole province of the trier of fact to resolve those discrepancies and give weight to whatever testimony it believes to be credible. *State v. Allen*, supra, 289 Conn. 559.

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sufficient evidence from which the jury reasonably could have found that the defendant entered into an agreement to commit assault in the first degree.<sup>16</sup> As discussed in the preceding paragraphs, the jury was presented with evidence concerning the Carter shooting on Liberty Street. From that evidence, the jury reasonably could have inferred that the defendant, as an “enforcer” for MGB, was expected to, and thus had motive to, use force against unsanctioned drug dealers operating in the area of Bedford Street and Albany Avenue, including the victim. In fact, the jury heard testimony that the defendant provided nearly identical reasons, consistent with that motive, for the Carter shooting and the shooting of the victim in this case. As to Carter, the defendant explained to Daniels that he had been shot because he “[kept] coming down there hustling, and he was meeting people in that back street”; similarly, as to the victim in this case, the defendant stated that the shooting had occurred because “[the] dude [kept] coming in the area trying to hustle.” Additionally, Doster testified that just a few minutes before the victim was shot, the defendant approached him and asked if he knew or was affiliated with the man selling drugs behind the 24 Hour Store. When Doster stated that he did not know who was selling drugs behind the store, the defendant told him not to “worry about it” because he was “going to go talk to [the person dealing drugs behind the store] and handle it.” From this evidence, the jury reasonably could have inferred that the

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<sup>16</sup> We note that the defendant does not argue on appeal that there was insufficient evidence that any member of the conspiracy, if established, engaged in an overt act in furtherance of the conspiracy. Rather, the defendant’s claim is limited to whether the jury was presented with sufficient evidence to sustain its findings that he intentionally entered into an agreement to conspire to and/or intended that a member of the conspiracy commit assault in the first degree by means of the discharge of a firearm. In light of the fact that the victim was, in fact, physically injured by means of the discharge of a firearm, our inquiry is limited to the first two elements of the charge of conspiracy.

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defendant had a motive to agree with other MGB members to cause physical injury to the victim in this case by means of the discharge of a firearm.

Moreover, the jury was presented with evidence and testimony from which it reasonably could have inferred that the defendant not only had motive to enter into a conspiracy, but that he played an active role in the planning and coordination of the assault of the victim. For instance, Rosado testified that S, a known member of MGB, spoke to the victim and planned to either purchase marijuana from him or to sell marijuana to him before the shooting. That testimony, coupled with Mohown's testimony that he intended to meet the victim behind the 24 Hour Store to smoke marijuana, would support a reasonable inference that S, someone known by Daniels to follow the defendant's orders, had attempted to lure the victim behind the 24 Hour Store where other MGB members were waiting to confront him. Indeed, this point was raised during the state's closing argument, wherein the prosecutor asked the jury to scrutinize the defendant's assertion that there was no agreement between the defendant and the shooter that evening and, in so doing, to consider whether it was mere coincidence that the defendant and four other members of MGB arrived at the same time, at the same location behind the 24 Hour Store, then joined together in beating the victim before one of their number shot him, or whether this was circumstantial evidence that the group had coordinated the confrontation with an interloping drug dealer on their gang's turf. Furthermore, the jury heard testimony from several witnesses that after the victim was shot, the group of men scattered and ran off in different directions, but that several minutes later, they reconvened in a different location behind a building on Brook Street, where the defendant instructed them to be careful

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because “the block was hot.” In crediting that testimony, the jury reasonably could have inferred that the defendant had arranged where the group would rendezvous after the assault was completed and, from that reasonable inference, it also could have inferred that the assault had been orchestrated, at least in part, by the defendant. See *State v. Vessichio*, 197 Conn. 644, 657, 500 A.2d 1311 (1985) (holding that although evidence of conspiracy “not overwhelming,” jury reasonably could rely on evidence that defendant picked up coconspirators in van after completed drug sale to support finding that defendant was involved in conspiracy to sell cocaine), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986); see also *State v. Stellato*, 10 Conn. App. 447, 454, 523 A.2d 1345 (1987) (jury may rely on defendant’s conduct prior to, during, and *after* completed crime to infer defendant was member of conspiracy).

Next, we conclude that there was sufficient evidence from which the jury reasonably could have found that the defendant intended that a member of the conspiracy cause physical injury to the victim by means of the discharge of a firearm. We reiterate that the jury heard evidence concerning the Carter shooting and, from that evidence, reasonably could have inferred that the defendant had both the motive and the ability to order other MGB members to shoot rival drug dealers as a means of exercising exclusive control of drug sales in the area of Bedford Street and Albany Avenue. Additionally, Doster testified that a few minutes after he spoke with the defendant, he observed someone of the defendant’s height and shape wearing dark clothing, holding a gun, covering his face, and running toward the area behind the 24 Hour Store. From this testimony, the jury reasonably could have inferred that it was the defendant whom Doster had observed, and that the defendant was holding a gun and had taken steps to conceal his identity

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from potential witnesses to the shooting. The jury also heard from several witnesses that the defendant, Jerk and Hollywood were armed with guns and, from such evidence, reasonably could have inferred that the defendant intended that at least one member of the conspiracy would discharge a gun during the assault of the victim. Last, the jury reasonably could have considered the fact that the defendant did not summon medical assistance for the victim and, from that evidence, inferred that the defendant intended to cause physical injury to the victim by means of the discharge of a firearm. See *State v. Fuller*, 58 Conn. App. 567, 575, 754 A.2d 207, cert. denied, 254 Conn. 918, 759 A.2d 1026 (2000).

“When determining both a defendant’s specific intent to agree and his specific intent that the criminal acts be performed, the jury may rely on reasonable inferences from facts in the evidence and may develop a chain of inferences, each link of which may depend for its validity on the validity of the prior link in the chain.” (Internal quotation marks omitted.) *State v. Williams*, supra, 94 Conn. App. 433. “[W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury’s verdict of guilty.” (Internal quotation marks omitted.) *State v. Chemlen*, supra, 165 Conn. App. 816. Accordingly, we conclude that, in viewing the evidence in the light most favorable to sustaining the conviction, there was sufficient evidence to support the jury’s finding that the defendant was guilty of conspiracy to commit assault in the first degree.

## II

### UNCHARGED MISCONDUCT EVIDENCE

The defendant next claims that the court abused its discretion in admitting uncharged misconduct evidence

related to (1) MGB's practices of selling drugs and enforcing its exclusive control over the drug trade in its territory, and (2) the Carter shooting, as evidence of the defendant's motive to use force and violence against the victim in this case. The defendant asserts that such evidence was not relevant but, even if it had some probative value, its probative value was substantially outweighed by its prejudicial effect. For the sake of continuity, we adopt the court's and parties' references to these separate forms of uncharged misconduct as "the drug evidence" and "the Carter evidence."

The following factual and procedural history is necessary for our resolution of these claims. On November 5, 2014, two days before trial, the court held a hearing on the state's motion to admit other crimes evidence. At the hearing, the state indicated that it intended to offer evidence as to "the defendant's drug trafficking in the area in question . . . his control of the area . . . his association with a gang known as [MGB] . . . and the enforcement of that area from individuals who would encroach on that drug trafficking turf." The state further indicated at that time that it intended to offer the Carter evidence during its case-in-chief.

In support of its motion, the state made the following offer of proof: as a matter of logistics, the state intended to devote the first two days of trial to presenting evidence of the shooting of the victim in this case. Thereafter, on the third day of evidence, it would present the Carter evidence. Such evidence would include testimony from Officer Michael Creter, the first Hartford police officer to respond to the scene of the Carter shooting, and Detective Claudette Kosinski, who, while processing the vehicle in which Carter was shot, recovered latent fingerprints that ultimately were linked to MGB member Jock. The state also stated that it intended to present testimony from Vachon Young, who had spoken to Carter minutes before the shooting. The state

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claimed that Young would testify that Carter had told him that he “was going to the area of Liberty Street to sell the defendant some drugs.” The state then indicated that it would call Daniels to testify about the conversation he overheard while inside the defendant’s apartment several days after the Carter shooting, in which the defendant acknowledged his planning of the Carter shooting, which he described as Jock’s initiation into the gang. In addition, the state indicated that it would call Rosado to testify that just before the victim was shot, “an identified associate or coconspirator, [S], asked [the victim] to go to the back of the 24 hour Store so that he could buy [drugs] from [the victim].” The state thus argued that the setup of the victim’s shooting, inducing the victim, through S, to go behind the 24 Hour Store either to sell or buy drugs, was “strikingly similar” to the defendant’s conduct before the Carter shooting, whereby the defendant “[summoned Carter] to the Liberty Street area so that he could buy from him.”

The state next indicated that it would call James Stephenson, a former supervisor in the state forensics laboratory, who would testify that he compared the bullets used in the Carter shooting with the bullet recovered from the victim,<sup>17</sup> and concluded by forensic analysis that the same firearm had been used in both shootings. Last, the state indicated that it would present the testimony of Weaver, who would discuss the cell phone records of the participants in the Carter shooting and the associated cell tower logs.

In response to this offer of proof, defense counsel informed the court that, although he had received the police reports submitted by the state months before the trial, the state’s written notice of intent to admit such evidence was vague because it failed to specify what subsection of the Connecticut Code of Evidence

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<sup>17</sup> See footnote 6 of this opinion.

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the state was relying upon to establish its admissibility. Without a more definite statement from the prosecutor as to the applicable subsection of the Connecticut Code of Evidence, defense counsel claimed that “it [was] a little hard to fashion an objection.” Defense counsel then commented that “notwithstanding the fact that bullets were fired from the same gun . . . eighteen or nineteen hours apart, I don’t see the relevance . . . [t]he description of the person . . . doesn’t fit my client . . . [and] there was a claim that what happened to . . . Carter was a result [of] a dispute over a woman. So, I, you know . . . relevance, common scheme, whatever the claim may . . . I don’t think it crosses the relevance threshold, number one. Number two . . . if it is able to crawl over the relevance threshold, barely, I see a tremendous prejudicial effect that far outweighs whatever minute probative value . . . is there. And that’s a concern of mine. But I need specificity, and that’s the whole point of me filing the motion for . . . notice of the uncharged misconduct . . . .”

Thereafter, by agreement of the parties, the court withheld its ruling on the admissibility of the proffered misconduct evidence to afford the state two more days to identify what exception to the Connecticut Code of Evidence on which it would rely in offering the evidence detailed in its offer of proof. Noting his agreement with the court’s suggestion, defense counsel stated, “[my] preference . . . would be to wait [until] Friday, and the rationale is just because of the additional names that were disclosed, the cases that [the state] is relying on, it would afford me an opportunity to see what I can do about it. . . . Based on the information disclosed today, I may have something for the court, possibly by tomorrow. Obviously, I’d like to get it to the court in advance of Friday.”

Two days later, in accordance with the court’s instructions, the state filed an amended notice of intent

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to offer other crimes evidence. In that filing, the state expressly stated that the Carter evidence would be offered as evidence of the defendant's intent and motive to conspire to participate and to aid the principal in shooting the victim in this case. The defendant did not file a motion in limine seeking the exclusion of such evidence.

On the second day of its case-in-chief, November 10, 2014, the state, outside the presence of the jury, reasserted its intention to introduce the drug evidence and the Carter evidence. Specifically, the state asserted that this evidence was relevant to the defendant's motive for being involved in shooting the victim, as well as to his control of the Bedford Street area. In addition, the state indicated its intention to offer evidence of a third instance of uncharged misconduct, which involved the defendant's separate alleged assault of a man named Nigel, because he had been selling drugs in the area controlled by MGB without the gang's permission.

In response to the state's amended notice of intent, defense counsel remarked: "I did have a chance to read [case law] over the weekend and I appreciate the opportunity to better get a handle on . . . the law surrounding the misconduct. I do understand the claim of relevancy by the state's attorney. However, I . . . do believe, in particular, with regard to the alleged bad act involving . . . Nigel, as well as the . . . involvement by my client in the [Carter] shooting, that . . . whatever probative value is achieved through the introduction of that evidence, it's far outweighed by the prejudicial impact. It's . . . overwhelming, in my opinion. . . . And although I do maintain my objection, and I'd ask the court to rule in my favor, I would ask the court, if the court intends to allow this testimony and this evidence in, to give the appropriate . . . limiting

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instructions throughout the introduction of this evidence as to what it's offered for and to the extent possible, obviously, to minimize the prejudicial aspects of . . . the evidence, in particular, the . . . [Carter] . . . evidence because it is . . . shocking and . . . my concern is . . . that the jury will take that evidence, disregard the actual evidence from this case and convict my client for his conduct or alleged conduct in that case."

The court subsequently ruled that it would allow limited uncharged misconduct evidence regarding the defendant's membership in MGB and its control of the drug trade in the Bedford Street area. The court further stated: "[A]s far as the shooting on Liberty Street is concerned, I have been weighing those factors for quite some time since I got this case, I guess, because there's so much material here provided through the grand jury investigation. And the fact that each of the charges in this information against [the defendant] are specific intent crimes, as opposed to general intent, makes the evidence, particularly the ballistics evidence, very relevant, highly probative. And, properly sanitized, I'm going to allow in evidence on the Liberty Street shooting that occurred eighteen hours after the incident that we're trying. As far as exactly what we need to sanitize, I want to go through that with you gentlemen in some detail. Of course, the fact that someone was killed at that scene is out."<sup>18</sup> Last, the court excluded evidence of the alleged assault on Nigel on grounds of its prejudicial effect on the defendant and lack of notice.

Shortly thereafter, in the presence of the jury, the prosecutor asked Campos whether there was "a certain . . . group" that hung out on Bedford Street and if it was known by a particular name. The defendant objected and asked to be heard outside the presence

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<sup>18</sup> See footnote 12 of this opinion.

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of the jury. The defendant then requested clarification as to whether the court's decision to admit the drug evidence included a ruling that the name of the gang was also admissible. The court clarified that, on the basis of its earlier ruling, the name of the gang was admissible. The defendant raised no further objections to the admission of such evidence.

That afternoon, after the testimony of Campos and Doster, both of whom testified without further objection as to the drug evidence; see part II A of this opinion; the court, sua sponte, instructed the jury that "[w]hen the state offers evidence of . . . misconduct, it's not being admitted to prove the bad character, propensity or criminal tendencies of the defendant. It's being admitted solely to show intent and motive. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or demonstrate a criminal propensity. You may consider such evidence if you believe it and further find that it logically, rationally, and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issues of motive and intent, and each of those legal concepts you will get an instruction on.

"On the other hand, if you don't believe the evidence or even if you do, you find it's not logically, rationally and conclusively support on the issues of motive and intent, you may not consider that testimony for any other purpose. You may not consider evidence of other misconduct of the defendant for any purpose, other than the ones I just told you about because it could predispose you to critically believe the defendant may be guilty of the offenses charged here merely because of the other alleged misconduct. So, you may consider that evidence, if you credit it, only on the issues of intent and motive."

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On the third day of trial, November 12, 2014, the state concluded its presentation of the evidence regarding the shooting of the victim. Thereafter, the court informed the jurors that the state was “going to shift gears in this case” and asked the jury to take a short recess. Outside the presence of the jury, the court inquired as to the order of the state’s witnesses and stressed that the state should take great care not to reveal that Carter had died on the night of the shooting. By agreement of the parties, the state informed the court that it would ask leading questions to its witnesses and instruct them that they were not to reveal that Carter had been killed, but only that he had been shot.

The court then summoned the jury back to the courtroom, after which it stated that “[t]he reason I said we’re switching gears, ladies and gentlemen, is, most of the evidence that’s remaining in the state’s case-in-chief, as far as I know, concerns a different incident, and I didn’t want you to be confused. And the state will be offering this evidence, and I will be giving you a specific instruction about it. . . . [T]here will be some evidence in this case of other acts of misconduct. It’s not being admitted to prove bad character, propensity of criminal tendencies of the defendant. It’s being entered simply to show intent and motive related to the crimes that are being tried in this case, and you may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged in our information, nor to demonstrate a criminal propensity.

“You may consider such evidence if you believe it and further find it logically, rationally and conclusively supports the issues for which it is being offered by the state. But it bears only on the issues of intent and motive concerning the charges that arise from the Bedford Street incident. And you may not consider evidence of other misconduct of the defendant for any purpose

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other than the ones I just told you because if you do, it may predispose your mind to . . . uncritically believe the defendant may be guilty of the offense here charged, merely because of other misconduct. For this reason, you consider it only on the issues of intent and motive.”

Thereafter, in accordance with its offer of proof, the state presented, inter alia, the testimony of Creter, Kosinski, Weaver, Stephenson and Daniels, the substance of which has been set forth previously in this opinion. Only Young, of the witnesses mentioned in the state’s offer of proof, did not testify. At the conclusion of the state’s case-in-chief that afternoon, the court reinstructed the jury that evidence regarding uncharged misconduct of the defendant was “admitted . . . only to establish . . . his intent, motive in the matter involving [the victim]. You may not consider such other evidence as establishing a predisposition on the part of the defendant to commit any crimes charged or to demonstrate a criminal propensity. . . . If you don’t believe the evidence or even if you do, and you find that it does not logically, rationally, and conclusively support on the issues of motive, intent in the [present] matter . . . then you may not consider it for any purpose.”

With these additional facts in mind, we address each of the defendant’s claims.

#### A

##### Drug Evidence

The defendant first claims that the court abused its discretion by admitting the drug evidence in this case because the fact that the defendant was a member of a drug selling gang was not relevant to his motive or intent to harm the victim or to conspire with or aid others to do so in this case, for which it was offered and admitted at trial. The state responds that this claim

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cannot be reviewed on appeal because the defendant failed to preserve the claim before the trial court. Rather, the state argues, the defendant objected only to the Carter evidence and to evidence of the separate assault of Nigel. In response, the defendant argues that he objected to the introduction of the drug evidence before and during trial, and thus that the claim was properly preserved for our consideration. We agree with the state.

“It is well established that generally this court will not review claims that were not properly preserved in the trial court. . . . Where a defendant fails to seek review of an unpreserved claim under either [*State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)] or the plain error doctrine [set forth in Practice Book § 60-5], this court will not examine such a claim.” (Citation omitted; internal quotation marks omitted.) *State v. Epps*, 105 Conn. App. 84, 92, 936 A.2d 701 (2007), cert. denied, 286 Conn. 903, 943 A.2d 1102 (2008). Here, the defendant did not object either to the relevance or the prejudicial effect of the drug evidence. Accordingly, we decline to reach the merits of that claim.

## B

### Carter Evidence

The defendant next claims that the court abused its discretion in admitting the Carter evidence because that evidence was not relevant either to his motive to commit or to any intent required for the commission of any charged offense. Alternatively, the defendant argues that, even if the Carter evidence was somehow relevant to his motive or intent, its probative value was outweighed by its prejudicial effect. In support of this claim, the defendant argues that the facts of the Carter shooting were so dissimilar from those of the present case that it had little, if any, bearing on the issue of the defendant’s alleged motive or intent. The defendant

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further argues that the violent nature of the Carter shooting created an inherent risk that it would unduly arouse the jurors' emotions or that the jury would use it as evidence of the defendant's propensity to commit violent acts. On those grounds, the defendant claims that the court abused its discretion in admitting the Carter evidence, and thus that he is entitled to a new trial.

The state disagrees, arguing that the defendant failed to preserve his claim that the Carter evidence was not relevant to the issues of motive or intent. Rather, the state argues, the defendant objected to the Carter evidence only on the ground that its probative value was outweighed by its prejudicial effect. The state thus argues that our review of the defendant's claim is confined to that narrow issue. The defendant responds that, by virtue of his remarks to the court on November 5, 2014, and his subsequent remarks on November 10, 2014, that he "maintained his objection" on the ground of relevance, and thus the issue of its relevance was properly preserved. We agree with the state.

As stated in part II A of this opinion, an appellate court is not bound to review a claim unless it was "distinctly raised at the trial or arose subsequent to the trial. . . ." Practice Book § 60-5; see also *State v. Rogers*, 199 Conn. 453, 460–61, 508 A.2d 11 (1986). Furthermore, it is well settled that "[o]ur review of evidentiary rulings made by the trial court is limited to the specific legal ground raised in the objection [to the trial court]. . . . This court reviews rulings solely on the ground on which the party's objection is based." (Internal quotation marks omitted.) *State v. Cocomo*, 302 Conn. 664, 679–80 n.6, 31 A.3d 1012 (2011). Here, the defendant's remarks on November 10, 2014, addressed only the issue of prejudice; the defendant did not specifically object to the Carter evidence on the ground of relevance. Although the defendant argues on appeal that,

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when he “[maintained his] objection” on November 10, 2014, he was referring to his November 5, 2014 remarks concerning relevance, such an argument is not supported by the record. Instead, a fair reading of the trial transcript indicates that the defendant’s comment referred to his objection as to the prejudicial effect of the Carter evidence, which he had raised in the paragraph immediately preceding his statement that he “[maintained his] objection.” We thus agree with the state that our scope of review is limited to whether the probative value of the Carter evidence was outweighed by its prejudicial effect.

We now address our standard of review and the legal principles applicable to the defendant’s claim. “As a general rule, evidence of guilt of other crimes is inadmissible to prove that a defendant is guilty of the crime charged against him. . . . The rationale of this rule is to guard against its use merely to show an evil disposition of an accused, and especially the predisposition to commit the crime with which he is now charged. . . . The fact that such evidence tends to prove the commission of other crimes by an accused does not render it inadmissible if it is otherwise relevant and material.” (Citations omitted; internal quotation marks omitted.) *State v. Braman*, 191 Conn. 670, 675–76, 469 A.2d 760 (1983). “Such evidence may be admitted for other purposes, such as to show intent, an element in the crime, identity, malice, motive or a system of criminal activity.” *State v. Brown*, 153 Conn. App. 507, 526, 101 A.3d 375 (2014), cert. granted on other grounds, 319 Conn. 901, 122 A.3d 636 (2015) (appeal withdrawn August 15, 2016). “When weighing the admissibility of relevant . . . misconduct evidence, a trial court is required to conduct a . . . balancing assessment of whether the evidence is more prejudicial than probative. This inquiry is required in order to militate against the risk that the attention of a jury may be distracted

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from consideration of the proof of the charges at hand, and, instead, and for improper reasons, fix the defendant's guilt on evidence of marginal evidentiary value. . . . The court bears the primary responsibility for conducting the balancing test to determine whether the probative value outweighs the prejudicial impact, and its conclusion will be disturbed only for a manifest abuse of discretion. . . .

"[U]ndue prejudice is not measured by the significance of the evidence which is relevant but by the impact of that which is extraneous. . . . [T]here are certain situations in which the potential prejudicial effect of relevant evidence would suggest its exclusion. They are: (1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Citations omitted; internal quotation marks omitted.) *Id.*, 530–31.

In the present case, the defendant argues that any probative value of the Carter evidence was outweighed by its prejudicial effect because (1) the state spent an undue amount of time on collateral issues; (2) the state's emphasis on such evidence likely confused the jury as to the issues in this case; (3) the jury likely used the Carter shooting as evidence demonstrating the defendant's propensity to engage in violent behavior, in violation of § 4-5 (a) of the 2009 edition of the Connecticut Code of Evidence;<sup>19</sup> and (4) the violent nature of the

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<sup>19</sup> Pursuant to § 4-5 (a) of the 2009 edition of the Connecticut Code of Evidence: "Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person."

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Carter shooting unduly appealed to the emotions of the jury.

The state counters that the probative value of the Carter evidence was not outweighed by its prejudicial effect. In support of its position, the state argues that such evidence was highly probative of the defendant's motive and intent to commit the crimes of conspiracy to commit and accessory to assault in the first degree because (1) the Carter shooting involved a conspiracy between some of the same actors who were involved in shooting the victim in this case, particularly, the defendant and Jerk; (2) it was committed with the same firearm that was used to shoot the victim in this case eighteen hours earlier; (3) it was set up and carried out in a manner that demonstrated the defendant's position of authority within MGB and his ability to order other members of MGB to shoot rival drug dealers, as allegedly happened in this case; and (4) it showed that the defendant's motives for the two shootings were identical: to prevent rival drug dealers from selling drugs without permission on MGB's turf. The state further argues that, consistent with the defendant's request, the court took adequate steps to minimize the prejudicial nature of the Carter evidence because the state was prohibited from eliciting testimony that Carter had been killed as a result of the shooting. So sanitized, it claims, the Carter evidence involved conduct no more shocking or brutal than that which the defendant is claimed to have engaged in when committing the charges at issue in this case. Last, the state argues that the court instructed the jury prior to, during, and after the presentation of the Carter evidence that it could use that evidence only for its consideration of the defendant's motive and intent in the present case.

After a thorough review of the record, we conclude that the court did not abuse its discretion in determining

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that the probative value of the Carter evidence outweighed its prejudicial effect. First, we note that the defendant admitted during the November 5, 2014 hearing that he had received the evidence concerning the Carter shooting several months prior to trial. The defendant thus had reasonable grounds to anticipate the evidence and was not unfairly surprised by the state's offer of such evidence. Second, we note that the state's presentation of such evidence was limited to the latter portion of the third and final day of evidence, and thus we cannot conclude that the introduction of such evidence caused the parties to spend an undue amount of time on these issues. See C. Tait & E. Prescott, *Connecticut Evidence* (4th Ed. 2008) § 4.9.2, p. 144. ("Whether delay is undue or time wasted is obviously a very subjective criterion. . . . In the end, this is a judgment call for the trial judge."). Third, we disagree that the admission of such evidence unduly distracted the jury from the issues in this case. The court's admission of the Carter evidence was premised on the state's offer that it would limit its inquiries to the defendant's self-proclaimed solicitation, participation and oversight of the shooting by Jock; his inculpatory statements that he had ordered the shooting because he believed Carter was selling drugs in MGB territory; and the fact that the same firearm was used on two separate targets within a span of eighteen hours. These facts went directly to a contested issue in the present case, namely, whether the defendant intentionally entered into an agreement to commit and intentionally aided the principal in the commission of assault in the first degree.

Last, although the defendant raises a colorable argument that the Carter evidence unduly aroused the emotions of the jury, we conclude that the court took adequate measures to minimize the emotional impact of such evidence. Our conclusion rests on the fact that the court excluded any evidence that the victim in this

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case died before trial;<sup>20</sup> excluded any evidence that Carter had been killed as a result of the shooting on Liberty Street; and repeatedly instructed the jury that its consideration of the Carter evidence was limited to the issue of the defendant's intent and motive to commit the crimes charged against him in this case, and thus could not be used to infer that the defendant had a predisposition to engage in criminal behavior. See, e.g., *Wiseman v. Armstrong*, 295 Conn. 94, 113, 989 A.2d 1027 (2010) ("it is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them" [internal quotation marks omitted]). Accordingly, we conclude that the court did not abuse its discretion in admitting the Carter evidence in this case.

### III

#### BATSON CHALLENGE

The defendant's final claim on appeal is that his constitutional rights were violated when the state used a peremptory challenge to strike a minority juror without providing a sufficient race neutral explanation, in violation of the doctrine of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We conclude that the record is inadequate to reach the merits of the defendant's claim.

Jury selection occurred over the course of two days, October 30 and 31, 2014. On the first day of jury selection, the parties conducted voir dire of a prospective juror, R.E.<sup>21</sup> Prior to defense counsel's questioning of R.E., the court inquired as to whether R.E. would suffer any financial hardship by participating in jury duty. In response, R.E. initially informed the court that, although

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<sup>20</sup> See footnote 6 of this opinion.

<sup>21</sup> "References to individual jurors will be made by use of initials so as to protect their legitimate privacy interests." *State v. Wright*, 86 Conn. App. 86, 88 n.3, 860 A.2d 278 (2004).

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he worked part-time, his shift began at 4:30 p.m. and that his job was within walking distance of the courthouse. The court then asked R.E. to contact his employer to determine whether he would be compensated for any work he missed or, alternatively, whether he would be able to begin his shift after 5 p.m. After speaking with his employer, R.E. stated that if he were selected to serve, he would be able to start his shifts after the court had adjourned for the day, and thus he had no financial concerns about being selected as a juror.

Thereafter, defense counsel questioned R.E. as to whether he could keep an open mind, determine which witnesses were credible, follow the court's instructions on the law, and engage in a free exchange of ideas with his fellow jurors during deliberations. R.E. answered in the affirmative to each of these questions. Thereafter, the following colloquy occurred during the prosecutor's voir dire of R.E.:

"[The Prosecutor]: . . . You're from Hartford?

"[R.E.]: Yes.

"[The Prosecutor]: You haven't heard anything about this incident—

"[R.E.]: No, sir.

"[The Prosecutor]: —which was presented to you? None of the names that were listed to you sounded familiar—

"[R.E.]: No, sir.

"[The Prosecutor]: —anything like that? So, you're at Easter Seals. You've been there for how long? You said about four years?

"[R.E.]: Four years.

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“[The Prosecutor]: Have you ever had anyone close to you, friends, family members, anyone like that, that has been the victim of a crime?”

“[R.E.]: No, sir.

“[The Prosecutor]: And if you were to hear information about drugs within this trial, do you think you could still consider that information and make your decisions or would you be turned off by that?”

“[R.E.]: I could still make my decision.

“[The Prosecutor]: Okay. Still be open-minded and consider all the information—

“[R.E.]: Yes.

“[The Prosecutor]: —presented?”

“[R.E.]: Yes, sir.

“[The Prosecutor]: Is there anything either of us have left out that you think would—would be important to tell us about your ability to sit here as a juror?”

“[R.E.]: No, sir.

“[The Prosecutor]: Great. Thanks for your time.”

Thereafter, R.E. exited the courtroom and the following colloquy occurred:

“[Defense Counsel]: Accepted.

“[The Prosecutor]: Excused.

“[Defense Counsel]: Your Honor, I would ask for a gender or a race neutral explanation or basis.

“[The Prosecutor]: Should I give one?”

“[The Court]: Yes.

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“[The Prosecutor]: It would be his employment history, Your Honor, and just basically his sense of security. I do have concerns also that he’s from Hartford, although he did indicate that he knew nothing about the offense.

“[Defense Counsel]: Your Honor, if I may. We have two Caucasian women on the panel at this point in time. He answered all the questions, in my view at least, and I think counsel would agree, honestly. He didn’t express any reservations about security. Being from Hartford is not a bar to be in this case. He did not express any familiarity with the case. I think he answered all the questions right. I think he’s got a right to serve on this panel.

“[The Prosecutor]: I think I presented a race neutral reason, Your Honor. It’s my prerogative. I don’t believe—or I’ve indicated to the court that I am not excusing him based on his race.

“[The Court]: His work history?

“[The Prosecutor]: Yes.

“[The Court]: All right. He’s excused.”

R.E. was then summoned to the courtroom and informed that he had been excused. After R.E. had been dismissed, the court, sua sponte, stated: “I would note that [R.E.] is not the same race as the defendant, African-American.”

Later that afternoon, the court asked defense counsel whether he wanted to offer any rebuttal to the state’s race neutral explanation for using its peremptory challenge to strike R.E. In response, defense counsel stated: “Well, I mean the idea that his employment, because he was freelancing, and the idea that he was still working, these are tough times, there was nothing extraordinary about being a freelancer. I meant that the record speaks

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for itself. I didn't hear anything extraordinary, like, he'd been a victim of a crime or had a brother incarcerated or had been harassed by the police or all the things that you typically hear from . . . individuals who . . . live in the city. His answers were . . . for lack of a better word, you know, correct, either posed by me or by counsel. So, no, I guess . . . I don't really have a rebuttal because I think the record . . . that's . . . kind of the point, the record speaks for itself."

On appeal, the defendant argues that his constitutional rights were violated because the state's race neutral explanation for striking R.E. was merely pretextual and that the state's willingness to accept two other venirepersons, I.L. and G.H.—both of whom the defendant claims were nonminority venirepersons who also held part-time jobs—demonstrates that the state's peremptory challenge as to R.E. was racially motivated. The state argues that the defendant is not entitled to review of this unpreserved claim due to the inadequacy of the record. The defendant responds that he adequately preserved this claim and, alternatively, seeks review pursuant to *State v. Golding*, supra, 213 Conn. 239–40 see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding's* third condition).

On the basis of the record presented, we conclude that the defendant did not preserve his claim of disparate treatment before the trial court; *State v. Young*, 76 Conn. App. 392, 399, 819 A.2d 884 ("because a claim of purposeful discrimination under *Batson* raises issues of fact to be decided by the trial court, the moving party's failure to inform the trial court of the full factual basis for the claim renders that claim unreviewable" [internal quotation marks omitted]), cert. denied, 264 Conn. 912, 826 A.2d 1157 (2003); nor did he satisfy the reviewability requirements of *Golding* because the transcripts of the voir dire do not indicate the racial composition of the empaneled jury. See *State v. Owens*,

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63 Conn. App. 245, 263, 775 A.2d 325 (“The defendant must satisfy the reviewability requirements of *Golding* before we consider his unpreserved claim. He did not object to the state’s exercise of any peremptory challenge during voir dire, and the transcripts of the voir dire do not indicate the race of any venireperson. The absence of a record bars our review of this claim.”), cert. denied, 256 Conn. 933, 776 A.2d 1151 (2001).

Further, the record belies the defendant’s assertion that there are adequate facts of record to demonstrate that the state engaged in racially disparate treatment by accepting both I.L. and G.H., whom the defendant claims were nonminority venirepersons with work restrictions similar to R.E.’s. First, although the court expressly noted that R.E. was *not* of the same race as *the defendant*, there is nothing in the record demonstrating R.E.’s personal race or ethnicity. *State v. Lane*, 101 Conn. App. 540, 548–49, 922 A.2d 1107 (“The record does not reflect [the venireperson’s] race. We conclude that we cannot review any *Batson* claim . . . that the defendant may have had regarding the state’s use of its peremptory challenge . . . because of a lack of a sufficient record.” [Footnote omitted.]), cert. denied, 283 Conn. 910, 928 A.2d 538 (2007). Second, the state correctly recognizes a similar lack of facts regarding I.L.’s race. Without such information, we cannot engage in an analysis of disparate treatment between I.L. and R.E. Finally, and contrary to the defendant’s assertion, the court expressly noted that G.H., the remaining venireperson cited in the defendant’s brief, was an African-American female. Thus, the prosecution’s acceptance of G.H. but not R.E. could not serve as evidence of the state’s discriminatory use of peremptory challenges to exclude similarly situated minority persons from the defendant’s jury. Absent such necessary facts of record, we decline to reach the merits of the defendant’s claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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CARLOS TORRES v. COMMISSIONER OF  
CORRECTION  
(AC 38544)

Lavine, Alvord and Keller, Js.

*Syllabus*

The petitioner, who had been convicted on a guilty plea of the crimes of burglary in the first degree and conspiracy to commit burglary in the first degree, sought a writ of habeas corpus, claiming that the respondent, the Commissioner of Correction, improperly had failed to give the petitioner risk reduction earned credits for his conduct that occurred during the period of time that he was confined as a pretrial detainee. Pursuant to the statute (§ 18-98e) that was enacted while the petitioner was serving his sentence, the respondent was required to implement a program in which eligible inmates can earn, at the discretion of the respondent, risk reduction earned credits to reduce the length of their sentences. Under the statute, the respondent could retroactively award such credits to inmates. Although the respondent retroactively credited the petitioner with 119 days of risk reduction earned credits on the basis of his conduct that occurred after the date he was sentenced up to the effective date of § 18-98e, the petitioner did not receive any such credits for the time he spent as a pretrial detainee on the ground that he was not eligible to earn credits before the date on which he was sentenced. In his habeas petition, the petitioner alleged, inter alia, that the respondent's application of § 18-98e violated the petitioner's constitutional right to the equal protection of the law. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The habeas court abused its discretion in denying the petition for certification to appeal; because the issues of whether § 18-98e, a relatively recently enacted statute, gives pretrial detainees the opportunity to earn risk reduction earned credits to be applied retroactively to their sentences, and if not, whether that is a violation of a pretrial detainee's constitutional right of equal protection were issues of first impression, the issues were debatable among jurists of reason, and could have been resolved by a court in a different manner.
2. The petitioner could not prevail on his claim that the habeas court improperly concluded that he was not eligible for risk reduction earned credits as a pretrial detainee and to have the credits applied retroactively to his sentence: the language of § 18-98e, which provides that any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, may be eligible to earn risk reduction credit, was clear and unambiguous, and demonstrated that the legislature intended to afford only sentenced inmates the opportunity to earn risk reduction

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earned credits, and, therefore, because the petitioner was not sentenced until September 22, 2009, he was ineligible to earn any risk reduction earned credits before that date, including the time in which he was a pretrial detainee; moreover, the petitioner could not prevail on his claim that § 18-98e violates the equal protection clause because it does not permit indigent individuals who are held in presentence confinement to earn risk reduction credits, as our Supreme Court recently addressed a nearly identical issue and determined that the exclusion of indigent individuals held in presentence confinement from the earned risk reduction credit scheme does not violate equal protection, and, therefore, the habeas court lacked subject matter jurisdiction over the petitioner's claim because it was not one for which habeas relief could be granted.

Argued March 8—officially released August 15, 2017

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Fuger, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

*Temmy Ann Miller*, assigned counsel, with whom, on the brief, was *Owen Firestone*, for the appellant (petitioner).

*Steven R. Strom*, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (respondent).

*Opinion*

LAVINE, J. The petitioner, Carlos Torres, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus (second petition). The petitioner claims that the court (1) abused its discretion by denying his petition for certification to appeal and (2) improperly concluded that he was not entitled to earn “risk reduction earned credit,” pursuant to General Statutes § 18-98e, during the period of time he was confined as a pretrial

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detainee,<sup>1</sup> and improperly concluded that he was not deprived of his right to equal protection guaranteed by the fifth and fourteenth amendments to the United States constitution. We agree that the habeas court abused its discretion by denying the petitioner's petition for certification to appeal, but conclude that it properly denied his second petition. Accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to resolve the petitioner's appeal. The petitioner was arrested on July 30, 2008, for crimes that took place on April 4, 2007, and charged with conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-101 and 53a-48 (a), and burglary in the first degree in violation of § 53a-101. Because of his inability to secure bond, he remained in the custody of the respondent, the Commissioner of Correction, as a pre-trial detainee while awaiting the resolution of the pending charges. On September 22, 2009, he pleaded guilty to both charges, and on that same day, the trial court, *Gold, J.*, sentenced him to fifteen years of incarceration, which was to be suspended after eight years, followed by five years of probation. The respondent credited the petitioner with 419 days of presentence confinement jail credits for the time he spent confined as a pretrial detainee from July 30, 2008, to September 21, 2009, pursuant to General Statutes § 18-98d.<sup>2</sup> On October 9,

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<sup>1</sup> In his second petition and on appeal, the petitioner describes himself as a "presentenced detainee" while he was confined in the custody of the respondent, the Commissioner of Correction, prior to being sentenced on September 22, 2009. However, he pleaded guilty to the offenses and was sentenced on the same day and, thus, did not spend any time confined in the custody of the respondent waiting to be sentenced after pleading guilty. For purposes of clarity, therefore, we will use the phrase "pretrial detainee" instead of "presentenced detainee" when referring to the petitioner's former status.

<sup>2</sup> General Statutes § 18-98d provides in relevant part: "(a) (1) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if

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2009, the petitioner was assigned an offender accountability plan. An offender accountability plan is created for every individual who is sentenced to a term of incarceration and recommends a list of rehabilitative programs the individual should participate in while he or she is incarcerated. The requirements of each plan are unique to each inmate because the recommendations within the plans are based on an inmate's criminal history and the nature of the underlying offense.

In 2011, while the petitioner was still serving his sentence, the General Assembly passed Public Act 11-51, codified at §18-98e.<sup>3</sup> Section 18-98e, effective July 1, 2011, requires the respondent to implement a program

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subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed . . . ."

<sup>3</sup> General Statutes § 18-98e provides in relevant part: "(a) Notwithstanding any provision of the general statutes, any person *sentenced to a term of imprisonment* for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date . . . may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006.

"(b) An inmate may earn risk reduction credit for adherence to the inmate's offender accountability program, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner . . . .

"(c) The award of risk reduction credit earned for conduct occurring prior to July 1, 2011, shall be phased in consistent with public safety, risk reduction, administrative purposes and sound correctional practice, at the discretion of the commissioner, but shall be completed not later than July 1, 2012.

"(d) Any credit earned under this section may only be earned *during the period of time that the inmate is sentenced to a term of imprisonment* and committed to the custody of the commissioner and may not be transferred or applied to a subsequent term of imprisonment. . . .

"(f) The commissioner shall adopt policies and procedures to determine the amount of credit an inmate may earn toward a reduction in his or her sentence and to phase in the *awarding of retroactive credit* authorized by subsection (c) of this section." (Emphasis added.)

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in which eligible inmates can earn, at the discretion of the respondent, risk reduction earned credits to reduce the length of their sentences. Eligible inmates can earn up to five risk reduction earned credits per month only if they adhere to their offender accountability plans, participate in eligible programs and activities, and exhibit good behavior. Notably, the respondent can retroactively award risk reduction earned credits to inmates based on their conduct that occurred on or after April 1, 2006, provided that their conduct met the requirements of subsection (b) of the statute and of the rules of the program created by the respondent.

In October, 2011, the respondent retroactively credited the petitioner with 119 days of risk reduction earned credits on the basis of his conduct that occurred between October 5, 2009, and October 1, 2011.<sup>4</sup> He was not credited with any risk reduction earned credits for his conduct that occurred during the period of time he was confined as a pretrial detainee between July 30, 2008, and September 21, 2009.

On July 27, 2015, the petitioner filed his second petition. In count one, he alleged that the “respondent’s application of . . . § 18-98e, deprive[d] the petitioner of his right to have a correct interpretation of the law applied to him” when it did not give him the “opportunity to earn or be awarded retroactive risk reduction earned credits for [the] period of time [he] spent as a presentenced detainee.” In count two, he alleged that the “respondent’s application of § 18-98e violated the petitioner’s right to the equal protection of the law, as guaranteed by the federal constitution.”

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<sup>4</sup> In accordance with § 18-98e (c), the respondent’s program became effective on October 1, 2011. For eligible inmates who were sentenced on or after April 1, 2006, the respondent started calculating the number of risk reduction earned credits they earned starting from fourteen days following the date on which they began serving their sentences because that is the day in which they are usually assigned their offender accountability plans.

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On August 4, 2015, the habeas court, *Fuger, J.*, conducted a habeas trial, during which both the petitioner and the respondent called witnesses to testify. Michelle Deveau, a records specialist with the Department of Correction, testified that the petitioner was not awarded any risk reduction earned credits for the time he spent confined as a pretrial detainee because he was not eligible to earn credits before the date on which he was sentenced. Heidi Palliardi, an employee for the Sentence Calculation and Interstate Management Unit of the Department of Correction, testified that every inmate is assigned an offender accountability plan approximately fourteen days after he or she is sentenced. She explained that inmates must adhere to their offender accountability plans in order to earn risk reduction earned credit because the purpose of the credits is “to encourage programming among the offender population, particularly the sentenced population.” The rules require adherence to offender accountability plans because the respondent “didn’t want to award credits to individuals [who] did not want to correct behavior.” She testified that pretrial detainees are not assigned offender accountability plans because they have not been convicted of an offense and, therefore, have not been sentenced.

On August 19, 2015, the habeas court denied the petitioner’s second petition. In its memorandum of decision, it stated: “[T]he statute that governs the award of [risk reduction earned credits] is clear and unambiguous. In order to earn [risk reduction earned credits], an inmate must be a sentenced prisoner. It is equally clear and beyond dispute that the petitioner was not a sentenced prisoner during this period. Consequently, it is clear that based upon [the] unequivocal meaning of . . . § 18-98e, the petitioner was ineligible to earn [risk reduction earned credits] during the period [from] July 30, 2008, [to] September 21, 2009.” (Emphasis omitted.)

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With regard to the petitioner's equal protection claim, the habeas court explained that because "credits to be applied to judicial sentences of incarceration are purely the creation of statute, it is clear that the legislature limited the circumstances under which [risk reduction earned credits] may be earned to a person who has already been *sentenced*," and to interpret the statute as meaning otherwise would "usurp the role of the duly elected members of the General Assembly . . . ." (Emphasis in original.)

On August 28, 2015, the petitioner filed a petition for certification to appeal, which the habeas court denied on September 18, 2015. This appeal followed.

### I

The petitioner's first claim on appeal is that the habeas court abused its discretion by denying his petition for certification to appeal.<sup>5</sup> Specifically, he argues

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<sup>5</sup> Although we conclude that the habeas court abused its discretion by denying the petitioner's petition for certification to appeal, we flatly reject the petitioner's argument that the habeas court abused its discretion on the ground that it "did not consider the petitioner's actual claims in denying certification." The petitioner asserted a number of times throughout his brief and during oral argument before us that the habeas court misconstrued the claims in his second petition. Specifically, he argues that he "never disputed that a [pretrial] detainee cannot *earn* [risk reduction earned credits] month-by-month when held in presentence confinement. Rather, [the] petitioner claim[s] that once an inmate was sentenced and thereafter credited with presentence confinement credit, those days of credit became time he was serving his sentence, and [the] respondent both was authorized and required to consider those days a period of time during which the inmate was serving his sentence before sentence was imposed, and to consider that time for an award of [risk reduction earned credits]." (Emphasis in original.)

On the basis of our review of the record, however, we wholly disagree with the petitioner's argument that the habeas court did not consider the petitioner's actual claims in rendering its decision. In count one of his second petition, he claimed that the respondent misinterpreted § 18-98e because the statute "is ambiguous with respect to a sentenced prisoner's *opportunity to earn or be awarded* retroactive risk reduction earned credits for the period of time spent as a [pretrial] detainee after April 1, 2006, and before July 1, 2011." (Emphasis added.) In count two, he claimed that his right to equal protection was violated because "having been held . . . as a [pretrial]

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that both of the underlying claims in his second petition have not been previously addressed by our appellate courts, and, therefore, both claims are debatable among jurists of reason and a court could resolve them in a different manner. We agree with the petitioner and conclude that the habeas court abused its discretion.

“Faced with the habeas court’s denial of certification to appeal, a petitioner’s first burden is to demonstrate that the habeas court’s ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that [1] the issues are debatable among jurists of reason . . . [2] [the] court could resolve the issues [in a different manner] . . . or . . . [3] the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . .

“In determining whether the habeas court abused its discretion in denying the petitioner’s request for certification . . . we review the petitioner’s substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria

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detainee, [he] did not have [the] *opportunity to earn* risk reduction earned credit[s] or retroactive risk reduction earned credit[s] for [the entirety] of his eight year sentence.” (Emphasis added.) In his prayer for relief, he requested that the habeas court order that he “is not excluded from *earning* retroactive risk reduction earned credits for the period of time he was held in presentence confinement on charges for which he was ultimately sentenced . . . .” (Emphasis added.) During the habeas trial, the petitioner’s counsel stated that the petitioner’s argument is that he “should have been deemed eligible to *have the opportunity to earn* such credits . . . based on the presentence time.” (Emphasis added.) Accordingly, we conclude that the habeas court properly reviewed the claims presented in the petitioner’s second petition.

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. . . for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citations omitted; internal quotation marks omitted.) *Miller v. Commissioner of Correction*, 154 Conn. App. 78, 84, 105 A.3d 294 (2014), cert. denied, 315 Conn. 920, 107 A.3d 959 (2015). This court has previously concluded that issues of first impression in Connecticut meet one or more of the three criteria. See, e.g., *Rodriguez v. Commissioner of Correction*, 131 Conn. App. 336, 347, 27 A.3d 404 (2011) (concluding petitioner's claim deserved encouragement to proceed further when issue not previously addressed by any Connecticut appellate court), aff'd, 312 Conn. 345, 92 A.3d 944 (2014); *Graham v. Commissioner of Correction*, 39 Conn. App. 473, 476, 664 A.2d 1207 (concluding petitioner's claim one of first impression and, therefore, debatable among jurists of reason and court could resolve issue in different manner), cert. denied, 235 Conn. 930, 667 A.2d 800 (1995).

On the basis of our review of the two claims raised by the petitioner in his second petition, we conclude that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal. We are unable to locate any case in which our appellate courts have addressed the issues of whether § 18-98e, a relatively recently enacted statute, gives pretrial detainees the opportunity to earn risk reduction earned credits to be applied retroactively to their sentences, and if not, whether that is a violation of pretrial detainees' right of equal protection guaranteed by the fifth and fourteenth amendments to the United States constitution.<sup>6</sup> Because the petitioner's second petition pre-

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<sup>6</sup> We note that the habeas court rendered its judgment before our Supreme Court decided *Perez v. Commissioner of Correction*, 326 Conn. 357, A.3d (2017). See part II B of this opinion.

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sents two issues of first impression in Connecticut, we will conduct a full review of the merits of his appeal.<sup>7</sup>

## II

The petitioner's second claim on appeal is that the habeas court improperly resolved the claims in his second petition. We disagree.

## A

The petitioner first claims, in essence, that the habeas court improperly concluded that he was not eligible for risk reduction earned credits as a pretrial detainee and to have the credits retroactively applied to his sentence.<sup>8</sup> Specifically, he argues that § 18-98e is not clear

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<sup>7</sup> We note that a petitioner is not automatically entitled to a review of the merits of a claim simply on the basis that the claim has not been previously addressed by our appellate courts. Rather, in deciding whether a habeas court abused its discretion in denying a petitioner's petition for certification to appeal, this court must conduct a case-by-case inquiry into whether the issue is debatable among jurists of reason, the court could resolve the issue in a different manner, or the issue is adequate to deserve encouragement to proceed further.

<sup>8</sup> The petitioner argues that he "does not claim [on appeal] . . . that [pretrial] detainees are entitled to the opportunity to earn [risk reduction earned credits] as they are being held prior to sentencing." Rather, he argues that his claim is that "an inmate who (1) was sentenced when [risk reduction earned credits] came into existence, and (2) had had a number of days applied to his sentence as presentence confinement credit, was serving his subsequently imposed sentence and was entitled to have those days considered for the award of retroactive [risk reduction earned credits]." There are two flaws with this argument. First, as previously discussed in footnote 5 of this opinion, this is not the claim that the petitioner asserted in his second petition. The claim in his second petition, the one properly considered by the habeas court, was whether pretrial detainees are entitled to earn risk reduction earned credits. Second, we conclude that the petitioner's characterization of his claim presents a distinction without a difference. It is not disputed that the only way in which individuals can obtain risk reduction earned credits is if they earn them. It logically follows that when considering the number of risk reduction earned credits an individual is entitled to be retroactively awarded, the respondent must decide whether the individual earned them during the period of time in question. Thus, the petitioner's argument on appeal that the respondent must consider the time in which he spent as a pretrial detainee when calculating his risk reduction earned credits is implicitly an argument that pretrial detainees are entitled to earn risk reduction earned credits.

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and unambiguous, and his interpretation of the statute is consistent with the intent of the legislature, namely, to “encourage inmates to participate in programming that would increase their chances of living law-abiding lives after being released from prison.” The respondent argues that § 18-98e is clear and unambiguous, and a plain reading of the statute reveals that the legislature intended to afford only sentenced inmates the opportunity to earn risk reduction earned credits. We agree with the respondent.

The petitioner’s claim requires us to interpret § 18-98e. “[I]ssues of statutory construction raise questions of law, over which we exercise plenary review.” (Internal quotation marks omitted.) *Kendall v. Commissioner of Correction*, 162 Conn. App. 23, 28, 130 A.3d 268 (2015). “When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.” (Internal quotation marks omitted.) *Cruz v. Montanez*, 294 Conn. 357, 367, 984 A.2d 705 (2009). “A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation. . . . Additionally, statutory silence does not necessarily equate to ambiguity.” (Internal quotation marks omitted.) *Kendall v. Commissioner of Correction*, *supra*, 37. “If the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intention of the legislature and there is no room for judicial construction.” *Johnson v. Manson*, 196 Conn. 309, 316, 493 A.2d

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846 (1985), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986).

The salient language of § 18-98e is: “(a) Notwithstanding any provision of the general statutes, any person *sentenced to a term of imprisonment* for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date . . . may be eligible to earn risk reduction credit toward a reduction of such person’s sentence . . . . (b) An inmate may earn risk reduction credit for adherence to the inmate’s offender accountability program, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner . . . . (d) Any credit earned under this section may *only be earned during the period of time that the inmate is sentenced to a term of imprisonment* and committed to the custody of the commissioner and may not be transferred or applied to a subsequent term of imprisonment. . . .” (Emphasis added.)

After considering the text of § 18-98e and its relationship to other statutes, we conclude that the statute is plain and unambiguous. The text of the statute clearly and unambiguously shows that the legislature intended for only sentenced inmates to be eligible to earn risk reduction earned credits. Subsection (a) expressly provides that “any person *sentenced to a term of imprisonment* for a crime committed on or after October 1, 1994” may be eligible to earn risk reduction earned credits, and subsection (d) expressly states that an individual is only eligible to earn risk reduction earned credits “during the period of time that the inmate is *sentenced to a term of imprisonment*.” (Emphasis added.) There is no other way to reasonably interpret these provisions apart from meaning that only sentenced inmates are eligible to earn risk reduction earned

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credits. Additionally, General Statutes § 18-7a (c)<sup>9</sup> provides: “Any person sentenced to a term of imprisonment for an offense committed on or after July 1, 1983, may, *while held in default of bond* or while serving such sentence, by good conduct and obedience to the rules which have been established for the service of his sentence, earn a reduction of his sentence . . . .” (Emphasis added.) The inclusion of the phrase “while held in default of bond” shows that the legislature intended to allow pretrial detainees who were unable to obtain bond to earn good conduct presentence credits. In contrast, no comparable language appears within the text of § 18-98e. If the legislature wanted to permit pretrial detainees to earn risk reduction earned credits, it would have included such a provision within the statute. See *Dept. of Public Safety v. State Board of Labor Relations*, 296 Conn. 594, 605, 996 A.2d 729 (2010) (“[w]e are not permitted to supply statutory language that the legislature may have chosen to omit” [internal quotation marks omitted]).

In the present case, the petitioner was arrested on July 30, 2008, for crimes that took place on April 4, 2007, and was not sentenced until September 22, 2009. Because he was not a sentenced inmate before September 22, 2009, we conclude that he was ineligible to earn any risk reduction earned credits before September 22, 2009, including the time in which he was a pretrial detainee between July 30, 2008, and September 21, 2009.

## B

The petitioner also claims that the respondent’s interpretation of § 18-98e violated his right to equal protection guaranteed by the fifth and fourteenth amendments

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<sup>9</sup> We are mindful that “[General Statutes] § 18-100d renders the good time statutes inapplicable to persons sentenced to a term of imprisonment for crimes committed on or after October 1, 1994.” *Velez v. Commissioner of Correction*, 250 Conn. 536, 552, 738 A.2d 604 (1999). Because the petitioner’s crimes were committed after October 1, 1994, this law is not relevant to the present appeal.

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to the United States constitution. It appears that he argues that inmates who spent time confined as pretrial detainees because they were indigent, like the petitioner, are similarly situated to inmates who were not incarcerated prior to serving their sentences. Because § 18-98e permits inmates to begin earning risk reduction earned credits only after they are sentenced, he argues that inmates who were incarcerated before they were sentenced “have a diminished opportunity to earn credits to reduce the number of days necessary to discharge their sentences.” He contends that this interpretation results in indigent inmates remaining incarcerated for longer periods of time than similarly situated nonindigent inmates, and, therefore, his fundamental right to liberty is infringed upon on the basis of his indigency, and § 18-98e should be reviewed under an “intermediate” heightened level of scrutiny, which it cannot pass. The respondent argues that the equal protection clause does not apply because pretrial detainees and sentenced inmates are not similarly situated. Even if they were, he argues that rational basis review of § 18-98e is appropriate, and there are numerous plausible justifications that support the constitutionality of the statute.

After the parties briefed this issue, and after oral argument before this court was conducted, our Supreme Court decided *Perez v. Commissioner of Correction*, 326 Conn. 357, A.3d (2017), which is dispositive of this claim. In *Perez*, the petitioner claimed that § 18-98e facially violates the equal protection clause because it does not permit indigent individuals who are held in presentence confinement to earn risk reduction credits. *Id.*, 382. Our Supreme Court held: “[E]ven if we assume that indigent individuals who cannot afford bail are held in presentence confinement prior to sentencing and nonindigent individuals who are not held in presentence confinement prior to sentencing are similarly situated, the petitioner’s claim is without

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merit. . . . [A]n inmate has no fundamental right in the opportunity to earn risk reduction credit because such credit is a creature of statute and not constitutionally required. The petitioner has not alleged that the earned risk reduction credit statute has caused him, or other indigent individuals, to be imprisoned beyond the maximum period authorized by statute. Therefore . . . the exclusion of indigent individuals held in presentence confinement from the earned risk reduction credit scheme does not violate equal protection if there is a rational basis for such treatment. . . . In the context of the rational bases identified in *McGinnis* [*v. Royster*, 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973)], therefore, the petitioner also has failed to state a claim for which habeas relief may be granted . . . .” (Citation omitted.) *Perez v. Commissioner of Correction*, *supra*, 386.

Although *Perez* is fully dispositive of the petitioner’s equal protection claim, it was decided subsequent to the judgment rendered by the habeas court on the merits of the present petition. We, therefore, affirm the judgment of the habeas court on the alternative ground that it lacked subject matter jurisdiction over the claim because it failed to state a claim for which habeas relief may be granted.

The judgment is affirmed.

In this opinion the other judges concurred.

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WELLS FARGO BANK, N.A. v. GENEVIEVE  
HENDERSON  
(AC 38563)

Lavine, Keller and Pellegrino, Js.

*Syllabus*

The plaintiff bank sought to foreclose a mortgage on certain of the defendant’s real property. The trial court granted the plaintiff’s motion for

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summary judgment as to liability and its motion for a judgment of strict foreclosure, and rendered judgment thereon, from which the defendant appealed to this court. *Held:*

1. The defendant could not prevail on her claim that the trial court improperly granted the plaintiff's motion for summary judgment as to liability, which was based on her claim that the plaintiff lacked standing to foreclose because it had not been assigned the mortgage and note until after it commenced the action: the trial court determined that the plaintiff proffered documentary evidence establishing a prima facie foreclosure case and that the defendant presented no evidence to support her argument that the plaintiff was not the holder of the note on the date the action commenced, and even if the mortgage was assigned after the foreclosure action commenced, the plaintiff's theory, which was supported by an affidavit, was that it was the holder of the note when the action commenced, and the un rebutted affidavit and copy of the note were sufficient to establish, for summary judgment purposes, the plaintiff's standing to foreclose; moreover, the trial court did not improperly decline to review the merits of several of the defendant's amended special defenses, which were substantively nearly identical to ones that previously were stricken by the court and, thus, were properly disposed of summarily by the court in ruling on the plaintiff's motion for summary judgment, the plaintiff's affidavit stating that the plaintiff possessed the original copy of the note was clearly a reference to the original document, and the defendant was not deprived of an evidentiary hearing on the issue of the plaintiff's standing, as she failed to establish that a genuine issue of material fact existed with regard to whether the plaintiff had standing to foreclose.
2. The defendant was not deprived of due process with respect to several motions and a request for a chain of custody hearing that she filed during the course of the litigation, the defendant having been provided with a full and fair opportunity to present her counterarguments to the plaintiff's motion for summary judgment as to liability: the record was inadequate for review of the defendant's claim that she was prevented from making oral argument on a second motion to dismiss that she filed, and even if the court did not hear argument on that motion, the defendant suffered no harm because she presented in other motions the same argument as to standing that she raised in the second motion, and the defendant was not deprived of an evidentiary hearing on the second motion because she submitted no proof to rebut the plaintiff's jurisdictional allegations in its complaint; moreover, there was no denial of due process with respect to the defendant's request for a chain of custody hearing because the granting of the plaintiff's motion for summary judgment dispensed with the need for any such hearing, the defendant had no right to an evidentiary hearing on her motion to reargue, which the court had the discretion to deny without a hearing, and the defendant was not deprived of oral argument on her motion for a

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continuance, as she failed to provide any record of a request for oral argument on that motion, oral argument was not required under the applicable rule of practice (§ 11-18 [a]), the trial court had the discretion to rule on the motion without providing for oral argument, and the defendant made no claim that the trial court abused its discretion in denying the motion.

Argued April 10—officially released August 15, 2017

*Procedural History*

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a counterclaim; thereafter, the court, *Marcus, J.*, granted the plaintiff's motion to strike; subsequently, the court, *Domnarski, J.*, denied the defendant's motion to dismiss; thereafter, the court, *Aurigemma, J.*, granted the plaintiff's motions for summary judgment as to liability and for a judgment of strict foreclosure, and rendered judgment thereon, from which the defendant appealed to this court. *Affirmed.*

*Genevieve Henderson*, self-represented, the appellant (defendant).

*Sean R. Higgins*, for the appellee (plaintiff).

*Opinion*

KELLER, J. In this foreclosure action, the self-represented defendant, Genevieve Henderson, appeals from the trial court's rendering of summary judgment in favor of the plaintiff, Wells Fargo Bank, N.A.<sup>1</sup> The defendant

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<sup>1</sup> On her appeal form, the defendant states that the judgment dates of the decisions being appealed are August 31, 2015, and August 11, 2014. The judgment of strict foreclosure was rendered on August 31, 2015; however, there is nothing in the record that reflects that a judgment was rendered on August 11, 2014. Nonetheless, the defendant states that she is appealing from "summary judgment-strict foreclosure," which were rendered separately on November 19, 2014, and August 31, 2015, respectively. After thoroughly reviewing the issues briefed by the defendant, we conclude that all of her claims relate to the court's granting of summary judgment on the issue of liability on November 19, 2014.

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claims that (1) the plaintiff failed to demonstrate that it had standing to foreclose, and (2) she was deprived of due process of law in connection with several motions that she brought during the course of the litigation.<sup>2</sup> We conclude that the defendant's claims lack merit and, accordingly, affirm the judgment of the court.

In rendering its summary judgment decision, the court, *Aurigemma, J.*, reviewed the documentation submitted in support of the plaintiff's motion for summary judgment, to which the defendant did not file any written objection. As a result of the lack of any objection, the court also considered the defendant's second motion for summary judgment, which in substance essentially was a cross motion for summary judgment, and the documentation annexed thereto, which had been filed subsequent to the plaintiff's motion. This approach was invited by the plaintiff's counsel, who pointed out to the court that the defendant's cross motion for summary judgment also served as a response to the plaintiff's motion for summary judgment.

In a memorandum of decision, the court stated the following with respect to its review of the supporting affidavits and documentation: "The [plaintiff] has moved for summary judgment on the grounds that there are no genuine issues of material fact as to the [defendant] and the plaintiff is entitled to summary judgment as a matter of law. The plaintiff has supported its motion with the affidavit of Alisha Mulder, vice president, loan documentation, of [the plaintiff], which appends the note, mortgage and notice of default. The defendant has supported her objection to . . . summary judgment with her own affidavit. . . .

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<sup>2</sup> In her appellate brief, the defendant raises three claims. The first two, however, are both premised largely on the defendant's assertion that the plaintiff lacked standing to foreclose. We therefore address both of those claims in part I of this opinion.

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“On December 31, 2007, the defendant executed and delivered a note to Wachovia Mortgage [Corporation] (Wachovia) in the original principal amount of \$180,000. [The plaintiff] has been the holder of the note for all times relevant to this action.

“Also on December 31, 2007, the defendant executed a mortgage . . . in favor of Mortgage Electronic Registrations Systems, Inc. (MERS), as nominee for Wachovia Mortgage Company to secure the note with real property located [in Middlefield]. . . . The mortgage was dated December 31, 2007, and recorded January 7, 2008. . . . MERS subsequently assigned the mortgage to [the plaintiff].

“The defendant is in default under the terms of the note and mortgage for failing to make payments. [The plaintiff] provided notice of default to the defendant dated April 18, 2010 and elected to accelerate the sums due and owing under the note. [The plaintiff] commenced this action against the defendant by [writ of] summons and complaint bearing a return date of August 31, 2010.

“The parties engaged in mediation through the Judicial Branch mediation program. When mediation was unsuccessful, the defendant filed an answer and [special defenses] on March 18, 2013, and a counterclaim on April 15, 2013. On February 21, 2014, the court granted [the plaintiff’s] motion to strike the special defenses and counterclaim.

“The defendant filed a motion to dismiss [the plaintiff’s] complaint for lack of standing on February 18, 2014. The court denied the motion to dismiss on May 6, 2014.<sup>3</sup>

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<sup>3</sup> This was the first of two motions to dismiss filed by the defendant. In her first motion, she alleged that the court lacked subject matter jurisdiction because the plaintiff lacked standing. Her claim of lack of standing was based on the fact that the plaintiff was not the original lender and had not submitted proof of an assignment of the note evidencing its status as the holder of the note at the time of the filing of its complaint. This claim, in

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“Thereafter, the defendant refiled her answer and substituted/amended [special] defenses and substituted counterclaim, which were nearly identical to those which had already been stricken by the court. The defendant added the following language to the substituted [special] defenses and counterclaim: ‘Because the plaintiff was not assigned the mortgage nor the note on or before August of 2010, [the] plaintiff lacks standing and cannot state a claim upon which relief may be granted.’ . . .

“In this case, the defendant does not dispute any of the facts alleged and support[ing] evidence establishing the plaintiff’s prima facie foreclosure case. She admits that she executed the mortgage, that she is in default, [and] that [the plaintiff] holds the note and mortgage. The defendant asserts, without any evidence, that [the plaintiff] was not assigned the mortgage and note on or before August, 2010, when it filed the complaint. The defendant also reasserts special defenses relating to loss mitigation and mediation, which this court has already rejected. . . .

“With no evidence supporting the first special defense (concerning standing), that special defense presents no impediment to the summary judgment. The second (refusal to accept payment), third (breach of contract) and fourth (misrepresentation of facts) special defenses have been stricken. In support of its motion to strike, the plaintiff argued that none of the special defenses

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substance, is identical to her claim as to lack of standing in her second motion to dismiss, and her claims as to lack of standing in both her first and second motions for summary judgment. In denying the defendant’s first motion to dismiss, the court, *Domnarski, J.*, ruled that the court could “accept the allegations in the complaint because the defendant has not filed any affidavit or document that calls into question that the plaintiff is the holder of the note. Furthermore, the defendant has not asserted that the plaintiff is not the holder of the note. An evidentiary hearing is not required. See *GMAC Mortgage, LLC v. Ford*, 144 Conn. App. 165, 174, 73 A.3d 742 (2013).”

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related to the making, validity and enforcement of the note and, therefore, did not constitute valid defenses to the foreclosure action. . . . The court agreed and struck the defenses and the counterclaim.

“The defendant has presented no evidence to support her argument that the plaintiff was not the holder of the note and assignee of the mortgage on the date this action commenced.<sup>4</sup> All of the statements of fact in the defendant’s affidavit relate to conduct which occurred during the mediation process.<sup>5</sup> Nothing in the note, mortgage or mediation statute [General Statutes § 49-31o] requires the plaintiff to modify the defendant’s mortgage. Therefore, the defendant’s claims that the plaintiff breached an agreement to modify the note and mortgage does not constitute a defense to the foreclosure action.” (Citations omitted; footnotes added.)

The court denied the defendant’s second motion for summary judgment on November 12, 2014, and granted the plaintiff’s motion for summary judgment on November 19, 2014. The defendant filed a motion to reargue on December 8, 2014, which the court denied on December 9, 2014. Thereafter, the court rendered judgment of strict foreclosure on August 31, 2015. The plaintiff filed this appeal on November 20, 2015. Additional facts and procedural history will be provided within the context of our analysis.

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<sup>4</sup> It is undisputed that the mortgage was not assigned to the plaintiff until after it had commenced this action. As we will discuss in part I of this opinion, although the court was incorrect in finding that the plaintiff was the assignee of the mortgage on the date the action commenced, the timing of the mortgage assignment has no bearing on the determination of whether the plaintiff had standing.

<sup>5</sup> After reviewing the defendant’s affidavit in support of her second motion for summary judgment, we can discern no factual allegations related to her special defenses. During oral argument before the trial court on August 11, 2014, however, both parties argued the viability of the defendant’s special defenses in relation to the foreclosure action.

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## I

The defendant claims that the plaintiff failed to demonstrate that it had standing to foreclose and, therefore, that the trial court improperly granted the plaintiff's motion for summary judgment. We address this claim first because, if the defendant prevails with respect to this claim, we need not address her remaining claims. We disagree that the plaintiff failed to demonstrate that it had standing to foreclose.

"[O]ur review of summary judgment rulings is plenary. . . . Pursuant to Practice Book § 17-49, summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Citation omitted; internal quotation marks omitted.) *J.E. Robert Co. v. Signature Properties, LLC*, 309 Conn. 307, 333, 71 A.3d 492 (2013). "Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue . . . by the bald statement that an issue of fact does exist." (Citations omitted; internal quotation marks omitted.) *Daily v. New Britain Machine Co.*, 200 Conn. 562, 568–69, 512 A.2d 893 (1986).

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“Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.” (Internal quotation marks omitted.) *One Country, LLC v. Johnson*, 314 Conn. 288, 297, 101 A.3d 933 (2014).

In support of her claim, the defendant argues that the plaintiff lacked standing to foreclose because it was assigned the note and mortgage after it commenced the present action. The parties presented the following documentation in connection with their cross motions for summary judgment.<sup>6</sup> The plaintiff provided, *inter alia*, a copy of the note, which shows an endorsement in blank, and a sworn affidavit from an employee of the plaintiff. The affidavit states that Wachovia transferred the note to the plaintiff on October 16, 2009, and that the plaintiff has retained and continues to retain possession of the note since the date of the transfer. Also provided by the defendant was a copy of an acceleration notice addressed to the defendant.

The defendant provided the court with a copy of a document entitled “Corporate Assignment of Mortgage” (assignment), which lists MERS as the assignor and the plaintiff as the assignee. The date of assignment listed on the document is October 7, 2011, a date occurring after this action was commenced. The defendant also executed an affidavit in which she asserts that, “based on [her] review” of the copies of the note and assignment, “[the plaintiff] was not assigned the note or mortgage on or before it commenced [its] action in August, 2010.” (Emphasis omitted.)

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<sup>6</sup> As noted previously, the defendant posed no written objection to the plaintiff’s motion for summary judgment, but the court considered the documentation she had attached to her subsequently filed second motion for summary judgment.

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This court has been very clear as to standing in the context of foreclosure actions: “The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer. If the foreclosing party shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing party is the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that might give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must prove that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note.” (Emphasis omitted; footnote omitted.) *U.S. Bank, National Assn. v. Schaeffer*, 160 Conn. App. 138, 150, 125 A.3d 262 (2015).

As noted previously, the court ruled that the plaintiff had proffered documentary evidence establishing a prima facie foreclosure case and that the defendant had presented no evidence to support her argument that the plaintiff was not the holder of the note on the date this action commenced. The facts alleged in the defendant’s affidavit, that “based on [her] review” of the copies of the note and assignment, “[the plaintiff] was

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not assigned the note or mortgage on or before it commenced [its] action in August, 2010,” are mere “bald assertions, [which] without more, are insufficient to raise a genuine issue of material fact . . . .” (Internal quotation marks omitted.) *CitiMortgage, Inc. v. Coolbeth*, 147 Conn. App. 183, 193, 81 A.3d 1189 (2013), cert. denied, 311 Conn. 925, 86 A.3d 469 (2014); see also Practice Book § 17-46 (affidavits supporting and opposing summary judgment “shall be made on personal knowledge”).

With respect to the defendant’s claim regarding the date of the assignment of the mortgage, which indisputably occurred subsequent to the commencement of this action, it is of no consequence to an analysis of standing that the mortgage was assigned after the proceeding commenced because the plaintiff’s theory, supported by the aforementioned employee affidavit submitted in support of its summary judgment motion, was that it was the holder of the *note* when the suit began. See *Chase Home Finance, LLC v. Fequiere*, 119 Conn. App. 570, 576–77, 989 A.2d 606 (“[General Statutes § 49-17] codifies the common-law principle of long standing that the mortgage follows the note . . . . Our legislature, by adopting § 49-17, has provide[d] an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him. . . . The holder is the person or entity in possession of the instrument if the instrument is payable to bearer. . . . When an instrument is endorsed in blank, it becomes payable to bearer . . . .” [Citations omitted; internal quotation marks omitted.]), cert. denied, 295 Conn. 922, 991 A.2d 564 (2010). The plaintiff’s un rebutted affidavit and copy of the note were sufficient to establish, for summary judgment purposes, the plaintiff’s standing to foreclose.<sup>7</sup> See *GMAC Mortgage, LLC v. Ford*, 144 Conn.

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<sup>7</sup> We also observe that, during a previous hearing on the first motion for summary judgment filed by the defendant, which occurred on June 2, 2014, at which the defendant was present, Judge Aurigemma *did* in fact review

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App. 165, 177, 73 A.3d 742 (2013) (prima facie burden of showing mortgagee is owner of debt “satisfied when the mortgagee includes . . . a sworn affidavit averring that the mortgagee is the holder of the promissory note in question at the time it commenced the action”); *HSBC Bank USA, N.A. v. Navin*, 129 Conn. App. 707, 712, 22 A.3d 647 (“because the defendant offered no evidence to contest the plaintiff’s assertion [in an affidavit] that it possessed the note at the time that it commenced the present action, we conclude that the plaintiff had standing”), cert. denied, 302 Conn. 948, 31 A.3d 384 (2011).

We briefly address a few of the defendant’s remaining arguments in support of her claim that the entry of summary judgment in favor of the plaintiff was improper. The court did not, as the defendant contends, improperly decline to review the merits of several of her amended special defenses in its memorandum of decision granting summary judgment. The court correctly observed that all but one of the defendant’s amended special defenses were, substantively, nearly identical to ones that previously were struck by the court. See Practice Book § 10-39. The court was therefore permitted to summarily dispose of those special defenses in ruling on the motion for summary judgment. See *Breen v. Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982) (“[w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case”).

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the original note, which was produced by the plaintiff’s attorney. Because a court may grant summary judgment in a foreclosure action even if the plaintiff does not produce the original note in support of its motion for summary judgment; see *GMAC Mortgage, LLC v. Ford*, 144 Conn. App. 165, 177, 73 A.3d 742 (2013); we see no need to address the defendant’s claim that only a copy of the note was produced on June 2, 2014, a factual assertion for which there is no basis in the record, or that the production during that hearing occurred ex parte because she did not view the document that was shown to the court.

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The one special defense that had not previously been struck alleged that the plaintiff did not have standing because it was not the holder of the note or the assignee of the mortgage when it commenced its foreclosure action, the very claim that formed the basis for the defendant's second motion for summary judgment, which the court clearly addressed as a cross motion.<sup>8</sup>

Additionally, the defendant argues that the plaintiff's affidavit was insufficient for summary judgment purposes to show that the plaintiff held the note when this proceeding commenced because the affidavit states that the plaintiff possessed "the original copy of the [n]ote . . . ." Specifically, the defendant posits that the phrase, "original copy," means something other than the original—that is, "wet ink"—note. We disagree. The more plausible interpretation in the context of the affidavit is that "the original copy" refers to the original note because, immediately prior, the affidavit states that "[o]n October 16, 2009, Wachovia transferred *the [n]ote* to Wells Fargo." (Emphasis added.) Even considered in isolation, the phrase, "the original copy," is clearly a reference to the original document. Accord *Johnson v. Cherry*, 422 F.3d 540, 547 n.2 (7th Cir. 2005) ("[i]f the document is *the original copy*, the ink of the signature will smear" [emphasis added]).

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<sup>8</sup> We note, however, that the court did not render summary judgment in favor of the plaintiff on the defendant's amended counterclaim, which remains undisposed and pending in the case. This was appropriate because a motion for summary judgment is directed at a specific pleading, defense or claim, and the plaintiff did not file a motion for summary judgment on the counterclaim. See W. Horton & K. Knox, 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2016–2017 Ed.) § 17-44, p. 826. As neither party sought a deferral of the appeal from the granting of the plaintiff's motion for summary judgment or the rendering of the strict foreclosure judgment, which constituted a final judgment on the entire complaint, this matter was properly appealed despite the lack of a conclusion of the entire case as a result of no judgment having been rendered on the counterclaim. See Practice Book § 61-2.

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Finally, the defendant argues that she was improperly deprived of an evidentiary hearing on the issue of the plaintiff's standing in connection with her second motion for summary judgment. The defendant's argument causes us to conclude that she misunderstands the nature and purpose of a motion for summary judgment, which is to determine whether there is a genuine *issue* of material fact on the basis of the pleadings, affidavits and any other proof submitted in documentary form. See Practice Book §§ 17-45 and 17-49. "The fundamental purpose of summary judgment is preventing unnecessary trials." *Stuart v. Freiberg*, 316 Conn. 809, 822, 116 A.3d 1195 (2015). If evidentiary presentations and testimony were to be permitted, the intent to reduce litigation costs by way of the summary judgment procedure would be undermined, and there may as well be a trial on the merits. As explained previously, in opposing the plaintiff's motion for summary judgment, as well as in the presentation of her second motion for summary judgment, the defendant did not establish that a genuine issue of material fact existed with regard to whether the plaintiff had standing to foreclose. For the foregoing reasons, the defendant's first claim fails.

## II

The defendant's second claim is that she was deprived of due process of law in connection with several motions and a "[r]equest" that she filed during the course of the litigation. The defendant has briefed this second claim in a haphazard and confusing manner, referring to motions that had been denied on previous dates despite the fact that she appeals only from the decision of the court granting summary judgment on the issue of liability in favor of the plaintiff, which was issued on November 19, 2014,<sup>9</sup> and the entry of the

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<sup>9</sup> See footnote 1 of this opinion.

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judgment of strict foreclosure on August 31, 2015. Nevertheless, we have striven to fit the pieces of the puzzle together and have discerned that she presents this claim as to the following pleadings: (1) a first motion for summary judgment, which claimed that the plaintiff lacked standing and was denied by the court on June 2, 2014; (2) a second motion to dismiss, denied by the court on June 30, 2014, which also claimed that the plaintiff lacked standing; (3) a request for a chain of custody hearing, to which the plaintiff objected for lack of any procedural basis in rule, case law or statute, and on which the court took no action, marking the matter off on August 4, 2014; (4) a motion for a continuance pursuant to Practice Book § 17-47, to permit the completion of discovery by the party opposing summary judgment; (5) a second motion for summary judgment, which was denied by the court on November 12, 2014; and (6) a motion to reargue, which the court denied on December 9, 2014. The defendant argues that the court improperly (1) refused to hear oral argument on the second motion to dismiss, the request for a chain of custody hearing, the motion for a continuance and the first and second motions for summary judgment, and (2) failed to conduct evidentiary hearings in connection with her second motion to dismiss, her request for a chain of custody hearing, her first and second summary judgment motions and her motion to reargue.

We disagree that the defendant was deprived of due process. The defendant presented to the court in numerous, repetitive filings her argument that the plaintiff lacked standing to foreclose because it was not in possession of the note and the mortgage prior to its initiation of this action, along with documents in support thereof.<sup>10</sup>

As to her claim of being prevented from presenting oral argument on her second motion to dismiss, which

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<sup>10</sup> See part I of this opinion for a description of those documents.

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was denied on June 30, 2014, the defendant has not provided us with an adequate record for review that substantiates her claim that the court ruled on this particular motion without providing her with an opportunity for argument. In the absence of evidence to the contrary, we presume that the court followed Practice Book § 11-18 (a), which grants a party filing a motion to dismiss the right to oral argument. The plaintiff contends that the court, at a hearing held on June 2, 2014, considered this motion along with the defendant's first motion for summary judgment, and that the parties presented oral argument on the issue of standing. A review of the transcript of that hearing does indicate that the court also considered the defendant's second motion to dismiss at that time. At the beginning of that hearing, the plaintiff's attorney brought the pendency of the defendant's second motion to dismiss to the attention of the court and advised the court that the second motion to dismiss made the same claim as to the alleged lack of the plaintiff's standing that the defendant was making in her first motion for summary judgment. The plaintiff further argued that the defendant's claim of lack of standing lacked evidentiary support. The plaintiff's counsel stated: "Aside from asserting a number of times in her various pleadings, which, if the court reviews the docket, you will see, most recently, I believe, a second motion to dismiss, even though the court has already denied the first motion to dismiss, and a subsequent motion to reconsider and reargue that motion. [The defendant] is simply restating over and over again that they don't have the note. They don't have the mortgage."

There is further support for the fact that the court considered the second motion to dismiss on June 2, 2014, because the court denied both motions subsequent to that hearing, denying the motion for summary judgment on June 2, 2014, and the second motion to

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dismiss on June 30, 2014. We further conclude that even if the court did not undertake to hear both motions on June 2, 2014, we are persuaded that the defendant suffered no harm or unfairness because she had ample opportunity to, and in fact did, present her argument, as set forth identically in both pending motions, relative to the plaintiff's alleged lack of standing.<sup>11</sup> Moreover, undaunted by the denial of her second motion to dismiss and her first motion for summary judgment, the defendant thereafter filed her second motion for summary judgment, reiterating her claim that the plaintiff lacked standing because it was not in possession of the note or the mortgage prior to the date it commenced this action.

As to the defendant's claim of deprivation of an evidentiary hearing on her second motion to dismiss, if the defendant submitted no proof to rebut the plaintiff's jurisdictional allegations in its complaint, the plaintiff was entitled to rest on its allegations and the court could consider them undisputed, thereby properly denying dismissal without the need to resort to further proceedings for the taking of evidence. No evidentiary hearing to establish jurisdictional facts is required unless the determination is dependent on the resolution of a critical factual dispute, which the defendant failed to raise. See *Conboy v. State*, 292 Conn. 642, 652, 974 A.2d 669 (2009); *Mengwall v. Rutkowski*, 152 Conn. App. 459, 465, 102 A.3d 710 (2014) (defendant not entitled to full evidentiary hearing on motion to dismiss contesting standing because "defendant failed to establish that a genuine dispute as to jurisdictional facts exists").

As for her claim of being deprived of oral argument on her motion for a continuance, on June 18, 2014, the defendant moved for an extension of time to file

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<sup>11</sup> We reject the defendant's assertion that the court denied her first motion for summary judgment only on procedural grounds. The record does not reflect the basis for the court's denial, and the defendant did not seek an articulation.

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discovery to properly respond to the plaintiff's motion for summary judgment.<sup>12</sup> On June 30, 2014, the court, *Aurigemma, J.*, issued an order stating that "[a]ll outstanding motions, including motions for summary judgment, shall be heard on August 11, 2014, at 9:30 a.m." The court, *Domnarski, J.*, granted the plaintiff an extension until July 21, 2014. On July 24, 2014, the defendant filed a motion for a continuance of the summary judgment hearing to permit the completion of discovery, which the court denied on August 6, 2014. A decision on a motion for a continuance is reviewed for an abuse of discretion by the trial court, but the defendant makes no claim that this denial was an abuse of discretion; she claims only that she was denied an opportunity to present oral argument on this motion. The defendant has failed to provide any record of a request on her part for oral argument of her motion, and a motion for a continuance is not one of the civil motions that require oral argument pursuant to Practice Book § 11-18 (a).<sup>13</sup> As a result, the court had the discretion to rule on her motion for a continuance without providing for oral argument. Furthermore, neither at the commencement of the hearing on August 11, 2014, or at any time during that proceeding did the defendant renew her request for a continuance.

With respect to the defendant's claim that she was deprived of oral argument and an evidentiary hearing on her request for a chain of custody hearing, to which

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<sup>12</sup> Her purported need for further discovery to object to the plaintiff's motion for summary judgment, however, had not deterred the defendant from filing two motions to dismiss and two motions for summary judgment on the basis of an alleged lack of standing by the plaintiff due to its not being in possession of the note prior to the filing of its foreclosure complaint.

<sup>13</sup> Practice Book § 11-18 (a) provides in relevant part: "Oral argument is at the discretion of the judicial authority except as to motions to dismiss, motions to strike, motions for summary judgment, motions for judgment of foreclosure, and motions for judgment on the report of an attorney trial referee and/or hearing on any objections thereto. . . ."

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the plaintiff objected, that request and the objection thereto had been marked off the short calendar by the court, *Domnarski, J.*, on August 4, 2014. At the commencement of the hearing on the plaintiff's motion for summary judgment and the defendant's second motion for summary judgment on August 11, 2014, the defendant acquiesced in the court's suggestion that there would be no need to discuss her request for a chain of custody hearing to resolve the issue of standing because first entertaining the pending summary judgment motions might resolve whether there was a need for such hearing. After hearing lengthy argument on the summary judgment jurisdictional and special defense issues, the court took the matter under advisement and adjourned. Prior to that adjournment, the defendant did not bring anything to the attention of the court that required additional consideration. The granting of the plaintiff's motion for summary judgment dispensed with any need for such a hearing, and the court had no need to consider it and did not ultimately deny it, as the defendant contends. There was no denial of due process with respect to the defendant's request for a chain of custody hearing.

In addition, as we noted in part I of this opinion, the defendant had no right to an evidentiary hearing on either her first or second motion for summary judgment. Although she claims that she was denied oral argument on both of her motions for summary judgment, the record discloses that the court heard oral argument on her first motion for summary judgment on June 2, 2014, and heard oral argument on her second motion for summary judgment on August 11, 2014.

Last, the defendant claims that her motion to reargue was denied without an evidentiary hearing. The defendant had no right to an evidentiary hearing on her motion to reargue, and the court had the discretion to deny it without a hearing. Practice Book § 11-12 (c)

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provides: “The motion to reargue shall be considered by the judge who rendered the decision or order. Such judge shall decide, without a hearing, whether the motion to reargue should be granted. If the judge grants the motion, the judge shall schedule the matter for hearing on the relief requested.”

We therefore conclude that the defendant was provided with a full and fair opportunity to present her counterarguments to the plaintiff’s motion for summary judgment as to liability. She has failed to demonstrate that a denial of her due process rights occurred.

The judgment is affirmed and the case is remanded for the purpose of setting a new law day.

In this opinion the other judges concurred.

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JOSE ARROYO ET AL. v. UNIVERSITY  
OF CONNECTICUT HEALTH  
CENTER ET AL.  
(AC 38701)

Alvord, Prescott and Pellegrino, Js.

*Syllabus*

The plaintiffs sought to recover damages from the defendant health center and the defendant state of Connecticut for medical malpractice for injuries sustained by the plaintiff A during a vasectomy. The plaintiffs claimed that the urologist employed by the defendants who performed the surgery, P, negligently injured A’s testicular artery, resulting in the removal of one of his testicles. Following a trial to the court, the trial court rendered judgment for the plaintiffs and the defendants appealed to this court. Prior to bringing this action, the plaintiffs filed a notice of claim with the Claims Commissioner pursuant to statute (§ 4-147), which was accompanied by a certificate of good faith, as required by statute (§ 4-160 [b]) in medical malpractice actions against the state, and the commissioner subsequently granted the plaintiffs permission to bring an action against the defendants. *Held:*

1. The defendants could not prevail on their claim that because the trial court rendered judgment for the plaintiffs on a theory of liability materially different from that which was alleged in their notice of claim, and

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for which they had received a waiver of sovereign immunity from the commissioner, the court was barred, under the doctrine of sovereign immunity, from rendering judgment for the plaintiffs on that theory of liability: given that the plaintiffs properly filed a timely notice with the commissioner seeking permission to pursue a medical malpractice action against the defendants and attached a good faith certificate to the notice, the commissioner, pursuant to § 4-160 (b), was required to grant the plaintiffs permission to bring their action, regardless of how precisely the plaintiffs worded the basis of their medical malpractice claim in their notice, and the fact that the notice of claim included more details, which were not in conflict with the theory pursued at trial, was not fatal to the plaintiffs' case; moreover, § 4-147 (2) expressly provides that the claim in the notice need not be particularized and requires only that the notice contain a concise statement of the basis of the claim, and the defendants failed to demonstrate that the basis of the claim in the notice filed with the commissioner was materially different from the basis of the plaintiffs' claim at trial.

2. This court declined to review the defendants' claim, raised for the first time on appeal, that the trial court improperly awarded damages to the plaintiffs on a theory of liability that was pursued at trial but was not alleged in their complaint, the defendants having waived their objection to any variance between the pleadings and the evidence by failing to object accordingly at trial.
3. The defendants' claim that the plaintiffs presented insufficient evidence on the issue of causation was unavailing; the testimony of the plaintiffs' expert, B, on causation relied on substantial evidence that was largely unchallenged by the defendants, B supported his opinion on causation through a method of diagnosis that involved a determination of which of a variety of possible conditions is the probable cause of an individual's symptoms, often by a process of elimination, and established the causal relation between A's injury and its later physical effects, and the court, as the trier of fact, was free to credit B's explanation for the cause of A's injury over that of the defendants' expert, and properly determined that the plaintiffs had satisfied their burden of proving that P injured A's testicular artery during the vasectomy and caused necrosis of A's testicle.

Argued May 16—officially released August 15, 2017

*Procedural History*

Action to recover damages for, inter alia, the defendants' medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Scholl, J.*; judgment for the plaintiffs; thereafter, the court granted the defendants'

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motion for a collateral source reduction, and the defendants appealed to this court. *Affirmed.*

*Michael G. Rigg*, for the appellants (defendants).

*Michael J. Walsh*, for the appellees (plaintiffs).

*Opinion*

PRESCOTT, J. In this action seeking damages for medical malpractice relating to a vasectomy, the defendants, the University of Connecticut Health Center (health center) and the state of Connecticut, appeal, following a bench trial, from the judgment of the trial court rendered in favor of the plaintiffs, Jose Arroyo and Marie Arroyo,<sup>1</sup> in the amount of \$386,249.81.<sup>2</sup> The defendants claim that the court improperly (1) rendered judgment on a cause of action for which the plaintiffs had not obtained a waiver of sovereign immunity from the state's Claims Commissioner (commissioner),<sup>3</sup> (2) awarded damages on a theory of liability that was not alleged in the plaintiffs' Superior Court complaint, and (3) concluded that the plaintiffs had satisfied their burden of proving that the defendants' employee, Peter Albertsen, a urologist, had negligently injured Arroyo's testicular artery. We disagree with the defendants' claims and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the defendants' claims. On April 1, 2013, Arroyo underwent a

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<sup>1</sup> In this opinion, we refer to Jose as Arroyo and to his wife, Marie Arroyo, as Marie.

<sup>2</sup> Specifically, the court initially awarded Arroyo \$36,249.81 in economic damages and \$300,000 in noneconomic damages on his medical malpractice claim, and awarded Marie \$50,000 in damages on her loss of consortium claim. The court thereafter granted the defendants' motion for a collateral source reduction and reduced Arroyo's economic damages award to \$20,383.44.

<sup>3</sup> The commissioner at that time was J. Paul Vance, Jr.

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vasectomy performed by Dr. Albertsen at the health center. Immediately after the procedure, Arroyo suffered pain that continued, unabated, for several days. Subsequently, on April 4, 2013, he went to the emergency room at Saint Francis Hospital and Medical Center (hospital), where it was discovered that his left testicle was necrotic<sup>4</sup> because of a lack of blood flow through the testicular artery. This required Arroyo to undergo an orchiectomy, or surgical removal of the testicle, that same day. The surgery was performed by Dr. Marlene A. Murphy-Setzko, a urologist at the hospital. This procedure resulted in discomfort and pain for Arroyo from protruding sutures and infection, which, in turn, required him to undergo further treatments over a period of five months.

Sovereign immunity generally prevents a litigant from suing the state for money damages without its consent. See *Morneau v. State*, 150 Conn. App. 237, 246, 90 A.3d 1003, cert. denied, 312 Conn. 926, 95 A.3d 522 (2014). Thus, in order to obtain permission to sue the defendants for money damages, the plaintiffs filed a notice of claim on September 13, 2013, with the commissioner pursuant to General Statutes § 4-147.<sup>5</sup> The notice was accompanied by a certificate of good faith, as required in medical malpractice claims brought against the state pursuant to General Statutes § 4-160 (b),<sup>6</sup> which provides in relevant part: “In any claim alleging malpractice against the state, a state hospital or against a physician, surgeon . . . or other licensed health care provider employed by the state, the attorney or party filing the

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<sup>4</sup> A “necrotic” testicle refers to the death of the tissues in the testicle, which is tantamount to the death of the testicle itself.

<sup>5</sup> General Statutes § 4-147 provides in relevant part: “Any person wishing to present a claim against the state shall file with the Office of the Claims Commissioner a notice of claim . . . .”

<sup>6</sup> We note that although § 4-160 has been amended since the events at issue, those amendments are not relevant to this appeal. For convenience, we refer in this opinion to the current revision of § 4-160.

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claim may submit a certificate of good faith to the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim.”

In their notice of claim filed with the commissioner, the plaintiffs alleged that “[d]uring the procedure Dr. Albertsen failed to identify, dissect and ligate the vas deferens, but instead he incorrectly dissected and ligated surrounding vascular structures thereby depriving, restricting and severing blood flow to [Arroyo’s] left testicle.” In an order dated November 6, 2013, the commissioner granted the plaintiffs permission to sue the defendants.

Subsequently, the plaintiffs commenced the present action against the defendants in Superior Court on January 29, 2014. The complaint, which was accompanied by a certificate of good faith as required by General Statutes § 52-190a,<sup>7</sup> contained two counts, the first sounding in medical malpractice on behalf of Arroyo and the second sounding in loss of consortium on behalf of Marie.

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<sup>7</sup> General Statutes § 52-190a (a) provides in relevant part: “No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. . . . To show the existence of such good faith, the claimant or the claimant’s attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . .”

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Count one mirrored the language used in the notice of claim filed with the commissioner, alleging that “Dr. Albertsen failed to identify, dissect and ligate the vas deferens, but instead he incorrectly dissected and ligated surrounding vascular structures, thereby depriving, restricting and severing blood flow to the plaintiff’s left testicle.” It also alleged that Dr. Albertsen was negligent in one or more of six ways, those being that he failed “[1] to properly identify the anatomy of the testicle, both before and during the procedure, by all means available to him, including palpation and visualization, to ensure that he adequately identified the spermatic cord and the vas deferens prior to his attempt to dissect the vas deferens . . . [2] to properly isolate and free the vas deferens from the surrounding anatomical structures prior to attempts to dissect the vas deferens . . . [3] to properly confirm that he had, in fact, identified the vas deferens by all means available to him, including palpation and visualization, before his attempts to dissect the vas deferens . . . [4] to dissect and ligate the vas deferens, and instead he incorrectly dissected and ligated surrounding blood vessels and vascular structures, thereby depriving, restricting and severing blood flow to the left testicle . . . [5] to timely and properly realize that he had, in fact, failed to dissect the vas deferens, but instead had dissected vascular structures in the testicle, and proceeded to conclude the procedure and discharge the patient from the facility; and . . . [6] to properly respond to and investigate the patient’s repeated complaints of unusual and inordinate pain, both during and following the procedure in question, which investigation in all likelihood would have led him to the realization that he had failed to sever and dissect the appropriate vas deferens and instead severed and dissected vascular structures necessary for the continued viability of the left testicle.”

The case progressed to pretrial discovery. During this time, the plaintiffs disclosed Dr. Michael Brodherson

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as their expert witness, and the defendants disclosed Dr. Wayne Glazier as their expert witness. The parties deposed both experts prior to trial.

Thereafter, on November 4, 2015, the trial commenced. The court heard testimony from several witnesses, including Dr. Albertsen, Dr. Brodherson, and Dr. Glazier. The evidence showed that during Arroyo's vasectomy, Dr. Albertsen failed to properly identify, dissect, and ligate the vas deferens in the left testicle and, instead, dissected and ligated a section of "vascular structures." There was no disagreement that the blood flow to the left testicle had been obstructed at the time that Arroyo was seen by Dr. Murphy-Setzko at the hospital on April 4, 2013, and that the loss of blood flow caused the necrosis of Arroyo's testicle. Rather, the parties disputed the cause of the injury. The plaintiffs argued that the injury to the testicular artery occurred during the vasectomy on April 1, 2013, and the defendants argued that testicular torsion<sup>8</sup> caused the loss of blood flow, meaning that the injury occurred sometime after the vasectomy, between April 1 and 4, 2013.

In a short memorandum of decision dated November 19, 2015, the court rendered judgment in favor of the plaintiffs. Specifically, the court concluded that the plaintiffs had established by a fair preponderance of the evidence that Dr. Albertsen was negligent in his treatment of Arroyo in that he "deviated from the standard of care of a board certified urologist in not isolating the vas deferens and [thereby] injuring the testicular artery to the left testicle of [Arroyo] during his performance of a vasectomy . . . ." This appeal followed.<sup>9</sup>

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<sup>8</sup> As Dr. Glazier testified, torsion "is a sudden loss of blood supply to the testicles usually by [the] twisting of the cord structures right above the testicle so that the blood flow is progressively diminished and subsequently cut off."

<sup>9</sup> The defendants filed a motion to reargue/reconsider, which the court denied. They do not challenge that ruling on appeal.

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Additional facts and procedural history will be set forth as necessary.

## I

The defendants claim for the first time on appeal<sup>10</sup> that the court improperly rendered judgment for the plaintiffs on a theory of liability materially different from that which was alleged in their notice of claim filed with the commissioner and, thus, from that which they had received a waiver of sovereign immunity. Specifically, the defendants argue that in alleging that Dr. Albertsen “dissected and ligated . . . vascular structures, thereby . . . severing blood flow to [Arroyo’s] left testicle,” the “vascular structure” to which the plaintiffs must have been referring in their notice of claim was the testicular artery because the only “vascular structure” that could have resulted in a lack of blood flow to the testicle was the testicular artery. The defendants then reason that because the plaintiffs’ theory of liability presented at trial was that Dr. Albertsen dissected and ligated a *vein*, not the testicular artery, and injured the nearby testicular artery in turn by unintentionally *cauterizing*<sup>11</sup> it, the plaintiffs did not obtain a waiver of sovereign immunity for the claim presented to the court.<sup>12</sup> We disagree.

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<sup>10</sup> Because sovereign immunity implicates the court’s subject matter jurisdiction, it may be raised at any time, including for the first time on appeal. See *Vejseli v. Pasha*, 282 Conn. 561, 575 n.12, 923 A.2d 688 (2007).

<sup>11</sup> As Dr. Brodherson testified at trial, cauterization is “the use of high intensity heat. . . . [I]t destroys the tissue to the point—it’s a sealant, actually. If we use it on blood vessels, it will seal an artery if it’s a small artery . . . . Or it can actually also cut . . . . If it’s a small vessel . . . it burns it, it closes it, it seals it. It has an odor to it and you see smoke coming out of it. But the main thing is that the bleeding will stop.”

<sup>12</sup> Specifically, Dr. Brodherson testified that “the vein and the arteries certainly run together. And in the process of isolating a vein, I’m sure some bleeding was provoked, which we expect. . . . And in the process of that, I’m sure anything bleeding in the area was cauterized to prevent—to effect hemostasis, which [Dr. Albertsen] says he did at the end of the procedure. And in one of the cauterization procedures, I’m sure the artery was cauterized.”

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“The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law.” (Internal quotation marks omitted.) *Morneau v. State*, supra, 150 Conn. App. 246. Therefore, “[o]ur Supreme Court expressly has stated that a plaintiff seeking monetary damages against the state must first obtain authorization from the Claims Commissioner.” *Id.*, 248. Section 4-147 provides in relevant part: “Any person wishing to present a claim against the state shall file with the Office of the Claims Commissioner a notice of claim . . . containing the following information: (1) The name and address of the claimant; the name and address of his principal, if the claimant is acting in a representative capacity, and the name and address of his attorney, if the claimant is so represented; (2) *a concise statement of the basis of the claim*, including the date, time, place and circumstances of the act or event complained of; (3) a statement of the amount requested; and (4) a request for permission to sue the state, if such permission is sought. . . . Such notice shall be for informational purposes only and shall not be subject to any formal or technical requirements, except as may be necessary for clarity of presentation and facility of understanding.” (Emphasis added.)

In most cases, “[t]he [commissioner] may deny or dismiss the claim, order immediate payment of a claim not exceeding [\$7500], recommend to the General Assembly payment of a claim exceeding [\$7500] or grant permission to sue the state.” *Morneau v. State*, supra, 150 Conn. App. 248; see General Statutes (Rev. to 2013) § 4-158 (b). Notably, however, as previously discussed herein, § 4-160 (b), which codified No. 98-76 of the 1998 Public Acts (P.A. 98-76), provides in relevant part that “[i]n any claim alleging malpractice against the state, a state hospital or against a physician . . . or other licensed health care provider employed by the state,

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the attorney or party filing [a malpractice] claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a,” and “[i]f such a certificate is submitted, the [commissioner] *shall* authorize suit against the state on such claim.” (Emphasis added.)

“Before § 4-160 (b) was enacted, medical malpractice claims were treated like other claims against the state under . . . the General Statutes. . . . [T]he effect of § 4-160 (b) was to deprive the . . . commissioner of his broad discretionary decision-making power to authorize suit against the state in cases where a claimant has brought a medical malpractice claim and filed a certificate of good faith. Instead, § 4-160 (b) *requires* the . . . commissioner to authorize suit in all such cases. In other words, the effect of the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the . . . commissioner, to a more expansive waiver subject only to the claimant’s compliance with certain procedural requirements.” (Citations omitted; emphasis altered; footnote omitted.) *D’Eramo v. Smith*, 273 Conn. 610, 622, 872 A.2d 408 (2005).

As a general matter, “[s]overeign immunity relates to a court’s subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review.” (Internal quotation marks omitted.) *Morneau v. State*, *supra*, 150 Conn. App. 246.

In the present case, the defendants assert that because the theory of liability presented in the plaintiffs’ notice of claim filed with the commissioner was different from the “cauterization theory” that the plaintiffs presented at trial, the court was barred by the doctrine of sovereign immunity from rendering judgment for the plaintiffs on this “new” theory. In doing so, the defendants principally rely on *Morneau* for support.

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In *Morneau*, the plaintiff filed a notice of claim with the commissioner, seeking to sue the state, among other defendants, for claims grounded in the alleged improper conduct of state marshals. *Id.*, 249. After the commissioner dismissed the claim as untimely, the plaintiff successfully obtained a reversal of that decision from the legislature, which passed a resolution allowing a waiver of sovereign immunity. *Id.*, 249–50. Accordingly, the plaintiff commenced an action in the Superior Court. *Id.*, 250. The trial court ultimately dismissed the case, however, on the ground that “there was nothing in the plaintiff’s initial claim to the [commissioner] that would support the distinct legal elements for the causes of action” alleged in his Superior Court complaint. *Id.*

On appeal, this court agreed with the trial court that the legislature never waived sovereign immunity for the claims at hand because “the plaintiff first raised these particular legal theories in [his] complaint,” and “our review of the materials before the [commissioner], and then the General Assembly, reveals no allegations that would support the elements of these distinct causes of action.” *Id.*, 251.

The defendants argue that the present case is analogous to the facts of *Morneau* in that the plaintiffs here did not obtain permission to sue for the cause of action presented to the Superior Court. We are unconvinced for several reasons.

First, *Morneau* involved an adjudication by the commissioner as to whether, in his or her *opinion*, a particular claim is “just and equitable” pursuant to § 4-160 (a).<sup>13</sup> Such an adjudication necessarily depends on the nature

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<sup>13</sup> General Statutes § 4-160 (a) provides: “Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable.”

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of the specific claim at hand and the facts that support it. In contrast, the present case, being a medical malpractice action, is subject to § 4-160 (b), which, as previously discussed, strips the commissioner of his discretionary decision-making power to authorize suit for such claims against the state if a certificate of good faith in accordance with § 52-190a has been submitted. *D'Eramo v. Smith*, supra, 273 Conn. 622. That is to say, the commissioner is *obligated*, without engaging in any discovery or adjudicatory processes, to authorize suit in all such cases. *Id.*

Here, the plaintiffs properly filed a timely notice with the commissioner, sought permission from the commissioner to pursue a medical malpractice action against the defendants, and attached a certificate of good faith. By virtue of the way in which this state's system for obtaining a waiver of sovereign immunity functions, the commissioner was, therefore, required to grant the plaintiffs' motion for permission to sue under the circumstances, regardless of how the plaintiffs precisely worded the basis of their medical malpractice claim in their notice.

In fact, the plaintiffs theoretically could have alleged more generally in their notice of claim that "Dr. Albertsen negligently performed a vasectomy," and, as long as they submitted a good faith certificate, the commissioner would have been obligated to grant a waiver of sovereign immunity to sue. The fact that the plaintiffs' actual notice of claim here included *more* details, which, as discussed further herein, did not conflict with the theory pursued at trial, is not fatal to their case.

Furthermore, in our view, the defendants' reading of *Morneau* is overly broad. Specifically, the defendants point to language in *Morneau* that provides that the plaintiff "needed to include information that would clarify the nature of the waiver sought and ensure that the

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[commissioner] . . . would have an understanding of *the nature of* that waiver.” (Emphasis added.) *Morneau v. State*, supra, 150 Conn. App. 252. In the present case, this concern about apprising the commissioner of “the nature of the waiver” has no applicability because of the mandatory obligation of the commissioner to grant the waiver in all medical malpractice actions that are accompanied by a good faith certificate.

Finally, putting aside any comparisons with *Morneau*, we simply do not agree with the defendants’ argument that the basis of the claim contained in the notice filed with the commissioner is materially different from the basis of their claim at trial. As previously stated, the plaintiffs’ notice of claim alleged that “Dr. Albertsen failed to identify, dissect and ligate the vas deferens, but instead he incorrectly dissected and ligated surrounding vascular structures thereby depriving, restricting and severing blood flow to [Arroyo’s] left testicle.”

At trial, the court admitted the pathology reports from the health center and the hospital that showed that Dr. Albertsen definitively had dissected and ligated a “section of muscular structure consistent with sections of a medium size vein”/“[p]ortion of [b]enign [v]ascular [c]onnective [t]issue” instead of the vas deferens.<sup>14</sup> Therefore, that portion of the notice alleging that Dr. Albertsen incorrectly dissected and ligated “vascular structures” was, in fact, presented to the court. Moreover, the plaintiffs argued at trial that “[Dr. Albertsen] proceeded to cut around [the vascular] structures with blunt and sharp dissection and cauterization,” and “[i]n so doing, he injured the testicular artery with the cautery,” thereby cutting off the blood flow to the left testicle. In other words, they argued that Albertsen’s act of mistakenly dissecting and ligating the vascular

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<sup>14</sup> We note that both experts testified at trial that the dissected section of “vascular structures” referred to in the pathology reports was, in fact, a vein.

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structures eventually resulted in the loss of blood flow to Arroyo's left testicle, as they also alleged in the notice. Accordingly, the plaintiffs' theory of liability in their notice accurately sums up the theory of liability presented at trial, albeit in a truncated manner that omits any express mention of cauterization in the causal chain.

Admittedly, the basis of the claim in the notice to the commissioner was not as particularized as it might have been, but this fact is unsurprising because the plaintiffs did not have the benefit of months of discovery prior to drafting it. In other words, because discovery had not yet been allowed, the plaintiffs were essentially hamstrung at the outset with how detailed they could be in setting forth their medical malpractice claim. Cf. *Briere v. Greater Hartford Orthopedic Group, P.C.*, 158 Conn. App. 66, 83, 118 A.3d 596 (2015) ("Medical malpractice actions present a conundrum in that there is typically unequal access to the underlying facts and conditions of the claim at the time a complaint is served. . . . [W]e conclude that a better reading of the pleadings is a broad but pragmatic one that promotes substantial justice . . . ." [Citation omitted.]), *aff'd*, 325 Conn. 198, 157 A.3d 70 (2017). Moreover, § 4-147 (2) expressly provides that the claim in the notice need not be particularized, as all that is statutorily required is "a concise statement of the basis of the claim"; (internal quotation marks omitted) *Morneau v. State*, *supra*, 150 Conn. App. 249 n.16; as opposed to "a formal declaration of the particular causes of action [the claimants seek] to bring against the state . . . ." *Id.*, 252. The permissive language of § 4-147—"such notice shall be for informational purposes only and shall not be subject to any formal or technical requirements"—appears to acknowledge that attaching any binding significance to this document at such an early stage of the proceeding

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would be unfair to a potential plaintiff. Therefore, we decline to do so in the present case.

For the foregoing reasons, we reject the defendants' assertion that the court improperly rendered judgment for the plaintiffs on a claim for which the commissioner had not granted a waiver of sovereign immunity.

## II

We next address the defendants' claim, raised for the first time on appeal, that the court improperly awarded damages to the plaintiffs on a theory of liability that was pursued at trial, but was not alleged in their Superior Court complaint. Because the defendants waived their objection to any variance between the pleadings and the evidence by failing to object accordingly at trial, we decline to address this argument on its merits.

In determining whether a judgment against a defendant should be set aside because of defects in a plaintiff's pleading of his cause of action, our Supreme Court has stated that "[t]he proper way to attack a variance between pleadings and proof is by objection at the trial to the admissibility of that evidence which varies from the pleadings, and failure to do so at the trial constitutes a waiver of any objection to such variance. . . . A variance is a departure of the proof from the facts as alleged. . . . Only material variances, those which disclose a departure from the allegations in some matter essential to the charge or claim, warrant the reversal of a judgment. . . . Where a case has been litigated wholly upon the merits a party is not permitted after judgment to take advantage of defects in procedure which, had attention been called to them at the trial, could readily have been amended." (Citations omitted; internal quotation marks omitted.) *Tedesco v. Stamford*, 215 Conn. 450, 461–62, 576 A.2d 1273 (1990).

In the present case, the defendants never objected during trial to the introduction of testimony elicited

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from Dr. Brodherson that the injury to Arroyo's left testicle was due to the cauterization of the testicular artery, on the ground that it was not properly pleaded in the complaint. If the defendants had believed that there was a material variance between the pleadings and the evidence introduced at trial and had raised the issue at that time, "the plaintiff[s] might have been permitted to amend [their] complaint and any prejudice could have been cured by a request for a continuance." *Id.*, 462. Because they never raised such an objection, however, any variance between the pleadings and proof at trial was clearly waived, and we, therefore, decline to address the merits of this argument.

### III

The defendants next claim that the court improperly concluded that the plaintiffs satisfied their burden of proving that Dr. Albertsen injured Arroyo's testicular artery. More specifically, they argue that the judgment should be reversed on the ground that the plaintiffs offered insufficient evidence on the issue of causation, being that the evidence they did offer of the cauterization theory was merely " 'surmise or conjecture' . . . ." We disagree.

The following additional facts and procedural history guide our resolution of this claim. As previously discussed, a substantial part of the evidence presented by both parties at trial came in the form of expert testimony from Dr. Brodherson, the plaintiffs' expert, and Dr. Glazier, the defendants' expert. Both experts testified on the issue of causation.

Dr. Brodherson began his testimony by explaining how a vasectomy is performed. In general, the surgery is designed to prevent the flow of sperm through the vas deferens, which is the duct that conveys the sperm, produced in the testis, from the epididymis to the urethra. First, the physician must locate and identify the

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vas deferens through the skin of the testicle by manual palpation. Once he or she has done so, the physician makes a small incision in the skin to access the structure. Before the physician can dissect and ligate<sup>15</sup> the vas deferens, however, he must isolate, or “strip,” the vas deferens from all of the surrounding structures, such as the veins and the testicular artery.<sup>16</sup> This occasionally results in bleeding, which the physician controls through either cauterizing or tying the vas deferens. Once the vas deferens is successfully isolated, the physician then dissects, or cuts, the vas deferens in two places, while at the same time removing a small sample to send to pathology for testing to confirm that the correct anatomical structure was cut. Thereafter, the physician will ligate each of the cut ends of the vas deferens, that is, either “tie it, clip it, however the doctor wants to do it, just to make sure that it’s permanent,” before placing it back into the testicle and closing up the incision.

The parties’ experts generally agreed that during Arroyo’s vasectomy, Dr. Albertsen engaged in the previously mentioned procedure, except that instead of isolating, dissecting, and ligating the vas deferens, he performed these procedures on a portion of “vascular structures,” i.e., a vein. Dr. Brodherson testified that, generally speaking, if blood flow to one of the multiple veins in the testicle becomes impeded, the testicle is not at risk of necrosis because of the many other veins that are still able to carry blood from the testicle. In contrast, if the blood flow through the testicular artery becomes impeded, the testicle will eventually die

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<sup>15</sup> According to Dr. Brodherson’s testimony, to “ligate” something is “to bind it or to tie it up.”

<sup>16</sup> Dr. Brodherson testified that “[t]he point of . . . isolating the vas [deferens] [is] . . . we really only want to tie off the vas [deferens]. We don’t want to tie off other structures, especially an artery. . . . [T]he vas [deferens] has to be isolated and it has to be on its own.”

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because this artery provides the organ with all of its essential nutrients.

Despite their agreement on the foregoing principles, the parties' experts disagreed on a critical point: how the lack of blood flow to Arroyo's left testicle, as reflected in the hospital's April 4, 2013 ultrasound results, occurred. On this issue, Dr. Brodherson testified: "[W]hen you're getting the vas [deferens] isolated, you've got to do some damage.<sup>17</sup> And when you cut it, you have to clean up the damage. . . . [B]ut [Dr. Albertsen] wasn't isolating the vas [deferens]; he was isolating a medium-sized vein. And that is where he got into trouble. . . . [T]he vein and the arteries certainly run together [in the same sheath]. And in the process of isolating a vein, I'm sure some bleeding was provoked, which we expect. . . . And in the process of that, I'm sure anything bleeding in the area was cauterized to prevent—to effect hemostasis, which he says he did at the end of the procedure. And in one of the cauterization procedures, I'm sure the [testicular] artery was cauterized. . . . And there would have been no reason in his mind to think that was the testicular artery because he believed he was working on the vas [deferens]." (Footnote added.)

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<sup>17</sup> Dr. Brodherson had previously testified that the process of isolating the vas deferens is occasionally "unpleasant" for the patient and "difficult" for the physician because the physician has to manipulate the patient's tissue in order to discover the vas deferens beneath the skin, move what he believes to be the vas deferens toward the surface of the skin, and make an incision in order to access the structure and complete the vasectomy. He stated that sometimes, however, after the incision is made, the structure that was manipulated is not, in fact, the vas deferens, "[s]o then we have to go digging around. And the skin is already open. You're getting bleeding. And you find—looking for it and the patient's squirming. I mean, this is not a walk in the park usually, often. But then we'll dig deeper sometimes. Sometimes it's a snap. Sometimes the patient has very thin skin. You can almost see it. . . . And then there's these others—it could be on the same patient—where it can take twenty minutes just to isolate."

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Dr. Brodherson explained that the testicular artery is more at risk if the physician is working on a vein instead of the vas deferens, stating: “When we do varicocele surgery and we remove veins, which is a procedure done for infertility, we use a dopplar in the operating room to make sure that it’s a vein and not an artery. That’s how delicate these things are. You can’t really see them. And it’s very possible to cut an artery or to sever an artery. . . . [W]e use the dopplar to identify the [testicular artery]. So, of course, if he had a dopplar—but he didn’t know he was on a vein. He was dissecting a vein. He wasn’t dissecting a vas [deferens]. Completely different structure.” Because of Dr. Albertsen’s wrong assumption about the structure he was working on, Dr. Brodherson reasoned that “he destroyed vital tissue because he was in the wrong part of that tiny area. . . . [T]he vas [deferens], well, that’s a different neighborhood. And the artery unfortunately took a hit.”

On the other hand, Dr. Glazier testified that the injury to Arroyo’s testicular artery could not have occurred during the vasectomy on April 1, 2013, because the reported blood loss was too small and that the injury was the result of torsion that had occurred “a day or two following his vasectomy.” Specifically, he testified that if Dr. Albertsen had destroyed the testicular artery during the vasectomy, there would have been “[s]ignificantly more” blood loss than the estimated “less than one milliliter” that he reported in his notes, because although the testicular artery is “not a huge artery,” “[i]t’s big enough. And if the patient had normal blood pressure, the pulsatile nature of the artery would break through the cautery seal and the patient will continue to bleed; if not at that moment, certainly within a short period of time.” In contrast, Dr. Brodherson testified regarding the blood loss that a physician might not know if he had cauterized or otherwise injured an artery

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because of its small size and the fact that it may go into spasm, or “close down [its blood flow] for a second,” upon any slight manipulation by the physician.

Dr. Glazier further opined that the necrosis of the left testicle must have been the result of torsion, which “is a sudden loss of blood supply to the testicles usually by [the] twisting of the cord structures right above the testicle so that the blood flow is progressively diminished and subsequently cut off,” that must have occurred sometime after the vasectomy on April 1, 2013, and before Arroyo went to the hospital on April 4, 2013. Dr. Brodherson testified, however, that he was “[a]bsolutely 100 percent” sure that this theory was not accurate.

More specifically, Dr. Brodherson testified that if torsion had occurred, the twisting of the cord would have killed “everything, the whole scrotal contents” of the left testicle, including the blood supply to the epididymis, a coiled structure on the top of the testicle that is a conduit for sperm. Because Dr. Murphy-Setzko, the physician who performed the orchiectomy on Arroyo, noted in her surgical pathology report and testified during her deposition that she observed Arroyo’s epididymis as appearing “tan to pink and soft” and, thus, healthy on April 4, 2013, Dr. Brodherson reasoned that the blood supply to the epididymis was not affected by the injury, and, therefore, torsion could be ruled out as a potential cause of the necrosis.

Dr. Brodherson also pointed to several other factors that informed this opinion, including (1) Dr. Murphy-Setzko’s operating notes expressly stating that the ultrasound suggested “lack of blood flow versus torsion,” (2) her deposition testimony that she “did not see torsion” in the testicle,<sup>18</sup> and (3) the age of Arroyo. With

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<sup>18</sup> We note that during her deposition testimony, Dr. Murphy-Setzko declined to offer any opinions on the issue of standard of care.

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regard to Arroyo's age, she stated that torsion is "out of the age group. I mean, it would be very unusual for a thirty-eight year old man, or forty, thirty-nine, whatever he was at the time. They don't get torsion. . . . I mean, you may get one in a million with torsion, but then you're just assuming this is the guy [who] just had a vasectomy and got torsion. And, you know, it's pretty coincidental. As you say, counselor, it stresses credulity. It's just ridiculous. Maybe one in—say, one in twenty, thirty, 40,000. So, you're telling us that this guy, poor gentleman not only just had a vasectomy, but then he—they're trotting out this diagnosis that doesn't even happen as a second coincidence? It just doesn't fit."

We next set forth the applicable standard of review and guiding principles of law for this claim. "Because the . . . claim challenges the sufficiency of the evidence, which is based on the court's factual findings, the proper standard of review is whether, on the basis of the evidence, the court's finding . . . was clearly erroneous. . . . In other words, a court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficiency when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Moreover, we repeatedly have held that [i]n a [proceeding] tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . Where there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Citations omitted; internal quotation marks omitted.) *State v. Trotman*, 68 Conn. App. 437, 441, 791 A.2d 700 (2002).

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“[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury.” (Internal quotation marks omitted.) *Gold v. Greenwich Hospital Assn.*, 262 Conn. 248, 254–55, 811 A.2d 1266 (2002). “Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard.” (Internal quotation marks omitted.) *Id.*, 255. Likewise, “[e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person.” *Milliun v. New Milford Hospital*, 310 Conn. 711, 725, 80 A.3d 887 (2013).

The defendants do not claim that there is insufficient evidence supporting the court’s findings regarding the appropriate standard of care and Dr. Albertsen’s deviation from that standard of care. Thus, we focus on the principles pertaining to causation. “All medical malpractice claims, whether involving acts or inactions of a defendant physician, require that a defendant physician’s conduct proximately cause the plaintiff’s injuries. The question is whether the conduct of the defendant was a substantial factor in causing the plaintiff’s injury. . . . This causal connection must rest upon more than surmise or conjecture. . . . A trier is not concerned with possibilities but with reasonable probabilities. . . . The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question. . . .

“To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert’s testimony is expressed in terms of a reasonable probability

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that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony." (Citation omitted; internal quotation marks omitted.) *Sargis v. Donahue*, 142 Conn. App. 505, 513, 65 A.3d 20, cert. denied, 309 Conn. 914, 70 A.3d 38 (2013).

"[I]t is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendants' conduct]. . . . This causal connection must be based upon more than conjecture and surmise." (Citations omitted; internal quotation marks omitted.) *Paige v. St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 25–26, 734 A.2d 85 (1999). A plaintiff, however, "is *not* required to disprove all other possible explanations for the accident but, rather, must demonstrate that it is more likely than not that the defendant's negligence was the cause of the accident." (Emphasis added.) *Rawls v. Progressive Northern Ins. Co.*, 310 Conn. 768, 782, 83 A.3d 576 (2014). "[T]he issue of causation in a negligence action is a question of fact for the trier . . . ." (Internal quotation marks omitted.) *Burton v. Stamford*, 115 Conn. App. 47, 87, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009).

In the present case, the defendants argue that because the only expert opinion supporting the plaintiffs' cauterization theory was from Dr. Brodherson, and because Dr. Brodherson's opinion that Dr. Albertsen cauterized the testicular artery was "rank speculation," the plaintiffs did not meet their burden of proving causation. We are unpersuaded by this argument.

First, Dr. Brodherson's testimony on causation relied on substantial evidence that was largely unchallenged by the defendants. Specifically, it was undisputed that Dr. Albertsen mistook a vein for the vas deferens during the vasectomy, as proven by the results of the two

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separate pathology reports admitted at trial. It was also uncontroverted by the results of the ultrasound performed at the hospital on April 4, 2013, that there was no blood supply to the left testicle, which is “tantamount to testicular death,” and, as Dr. Brodherson testified, the testicle’s main source of nutrients via blood supply is the testicular artery.

Furthermore, the plaintiffs showed that as a result of Dr. Albertsen’s misidentification of the vas deferens, he was working perilously close to the testicular artery. The defendants assert in their brief that Dr. Brodherson “provided no explanation as to why mere proximity to the veins was sufficient to conclude that the artery was injured.” To the contrary, Dr. Brodherson explained several times during his testimony why the testicular artery is significantly more at risk if one is performing surgery on a vein as opposed to the vas deferens, emphasizing that the veins and artery run close together in the same sheath in the spermatic cord. He testified that the artery is extremely delicate and that it is so small, “[y]ou can’t really see [it].” He also described in detail the highly specialized piece of equipment, i.e., a dopplar, that physicians utilize when they are operating on the veins near the artery for other types of urologic procedures, such as a varicocelectomy. Dr. Brodherson explained how the dopplar helps physicians to identify and visualize the artery so that they are able to protect it from dissection and cauterization during these procedures, and stated that Dr. Albertsen, in the present case, essentially “[performed] a varicocelectomy without having a dopplar,” a very precarious act because of the risk of loss of blood flow posed to the testicle.

Ultimately, Dr. Brodherson supported his opinion on causation through the process of “differential diagnosis,” which is “a method of diagnosis that involves a determination of which of a variety of possible conditions is the probable cause of an individual’s symptoms,

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often by a process of elimination.” *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 114 n.13, 998 A.2d 730 (2010). The only two possible causes of Arroyo’s necrotic left testicle that were offered by the experts at trial were the cauterization theory testified to by Dr. Brodherson and the torsion theory. As previously discussed herein, Dr. Brodherson considered and rejected the latter as a possible cause of the injury based soundly on the evidence that the epididymis contained blood flow at the time Dr. Murphy-Setzko performed the orchiectomy on April 4, 2013. As Dr. Brodherson testified, Arroyo’s healthy epididymis “is the nail that . . . shuts the coffin. Because the epididymis would have been dead had it been torsion.” In other words, Dr. Brodherson established the causal relation between the injury and its later physical effects “by his deduction by the process of eliminating causes other than the traumatic agency,” as is permitted by our case law. (Internal quotation marks omitted.) *Sargis v. Donahue*, supra, 142 Conn. App. 513; see also *Ward v. Ramsey*, 146 Conn. App. 485, 490–91, 77 A.3d 935, cert. denied, 310 Conn. 965, 83 A.3d 345 (2013).

In contrast, Dr. Glazier’s expert opinion on why Arroyo’s necrotic left testicle must have been caused by torsion was based largely on the fact that Dr. Albertsen did not report that there was any significant bleeding during the vasectomy. Dr. Brodherson’s testimony, however, refuted that there always will be significant bleeding if the artery is injured because, in some cases, the artery will be in spasm, and, thus, less blood will be flowing through it. The court was free to credit Dr. Brodherson’s explanation.

Dr. Glazier also opined that the most likely explanation was torsion because there was no indication during the orchiectomy that the artery was severed, as there was no indication that Dr. Murphy-Setzko had observed

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the testicular artery at all.<sup>19</sup> In contrast to this, however, Dr. Brodherson testified that the fact that Dr. Murphy-Setzko stated that she could not find the artery during the procedure is “a complete diversion” and did not surprise him “[b]ecause it had been previously injured, cauterized. And—first of all, why would you look for it? And second of all, you’re never going to find it. The thing died four days ago. It’s retracted in. It’s black like everything else. So, it’s completely irrelevant. There’s no need to find the artery. I mean, you couldn’t find it.”

As this court has held many times over, “[c]onflicting expert testimony does not necessarily equate to insufficient evidence.” (Internal quotation marks omitted.) *Dallaire v. Hsu*, 130 Conn. App. 599, 603, 23 A.3d 792 (2011). Rather, “[w]here expert testimony conflicts, it becomes the function of the trier of fact to determine credibility and, in doing so, it could believe all, some or none of the testimony of either expert.” (Internal quotation marks omitted.) *DelBuono v. Brown Boat Works, Inc.*, 45 Conn. App. 524, 541, 696 A.2d 1271, cert. denied, 243 Conn. 906, 701 A.2d 328 (1997). Thus, in the present case, the court, as the trier of fact, certainly was free to reject the defendants’ theory of torsion and to credit the opinion of the plaintiffs’ expert that the testicular artery was cauterized during Dr. Albertsen’s dissection and ligation of the vein.

In sum, we highlight that in order to prove causation, a plaintiff “must demonstrate that it is more likely than not that the defendant’s negligence was the cause of the accident.” *Rawls v. Progressive Northern Ins. Co.*,

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<sup>19</sup> The defendants also tried to make the argument that the code that Dr. Murphy-Setzko used on her hospital reports for Arroyo, indicating that his diagnosis was “testicle torsion,” lent support to their theory that torsion was the cause. Significantly, however, Dr. Murphy-Setzko testified herself that she merely used this code because the hospital’s record system did not provide a code for vascular injury, and she “had to pick what’s the next closest thing.”

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supra, 310 Conn. 782. “[T]he issue of causation in a negligence action is a question of fact for the trier . . . .” (Internal quotation marks omitted.) *Burton v. Stamford*, supra, 115 Conn. App. 87. We agree with the plaintiffs that the court’s finding was not clearly erroneous in that regard. Accordingly, we conclude that the court properly determined that the plaintiffs had satisfied their burden of proving that Dr. Albertsen injured Arroyo’s testicular artery and, thus, caused the necrosis of Arroyo’s left testicle.

The judgment is affirmed.

In this opinion the other judges concurred.

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JOSEPH COHEN v. ROBERT MEYERS ET AL.  
(AC 38737)

Sheldon, Beach and Mihalakos, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant general contractor, M, and the defendant R Co., of which M was the president and sole shareholder, for, inter alia, breach of a home construction contract. The defendants thereafter filed a counterclaim alleging breach of contract, defamation and intentional infliction of emotional distress. The matter was tried to the court, which rendered judgment in part for the plaintiff, concluding that R Co. had violated the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) by failing to comply with the New Home Construction Contractors Act (act) (§ 20-417a et seq.) and, inter alia, by not registering as a new home construction contractor with the Department of Consumer Protection while negotiating a contract with the plaintiff. The court also rendered judgment in part for the defendants on the counts of their counterclaim alleging breach of contract and defamation. On the plaintiff’s appeal and the defendants’ cross appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly failed to pierce the corporate veil of R Co. and to hold M personally liable for fraud and violation of CUTPA; although the court determined that R Co. failed to comply with the act governing new home construction contracts and that that failure constituted a violation of CUTPA, it concluded that M’s control of R Co., alone, was an insufficient basis on which to pierce the corporate veil and that the plaintiff’s proof did not

establish wilful, malicious, immoral or deceitful conduct by M, the record having supported the court's finding that the plaintiff offered insufficient evidence to satisfy the instrumentality test for disregarding a defendant's corporate structure.

2. The trial court properly ruled in favor of M on his defamation claim, that court having found that the plaintiff's statements that M was a cheat, thief, liar, admitted criminal, and incompetent building contractor, and that M had caused the death of a customer, cheated on his wife, or contracted a venereal disease, were defamatory per se, and that the plaintiff had not met his burden of proof as to his special defense that the subject statements were true or substantially true; moreover, the court properly rejected the plaintiff's claims that his statements were privileged, as it found that the statements were made with actual knowledge that they were false or with reckless disregard for whether they were false, that actual malice had been proven by a preponderance of the evidence, resulting in the loss of any conditional privilege, and that the speech in question was solely a contrived means for malicious harassment on a matter of private concern and, thus, was not constitutionally protected as concerning a matter of public concern, and this court adopted the reasoning of the trial court as a proper statement of the facts and legal analysis on the issues raised on appeal.
3. The defendants could not prevail on their claim on cross appeal that the trial court improperly awarded the plaintiff damages on his CUTPA claim against R Co. because the plaintiff did not prove that he suffered any compensable injury as a result of R Co.'s failure to comply with the act governing new home construction contracts: the court, which credited the plaintiff's testimony that he received the necessary disclosures from R Co. as required under the act, and that it was highly likely that he would not have contracted with or paid R Co. the sum of \$54,750, awarded the plaintiff compensatory damages for that amount, for which he received little or no benefit and which represented his out-of-pocket costs directly associated with the parties' contract; moreover, the fact that the parties' contractual relationship ultimately deteriorated, which also may have caused the plaintiff damages, was not a basis for concluding that the court's finding that R Co.'s CUTPA violation proximately caused the plaintiff damages was clearly erroneous.
4. M could not prevail on his claim that the trial court improperly failed to award him punitive damages on his defamation claim; that court, which noted that it had considered all of the evidence presented at trial, declined to award punitive damages to either party without setting forth the specific legal or factual bases for its decision, and in the absence of specific details set forth by the court on which it may have relied, it was presumed that the court properly applied the law and did not abuse the wide discretion afforded to it in making that determination.
5. M's claim that the trial court erred in rejecting his claim for intentional infliction of emotional distress was unavailing; the court found that even

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if the plaintiff was engaged in a personal vendetta intended specifically to humiliate and harass M or to make him lose his job, the specific conduct of the plaintiff did not rise to the level of extreme and outrageous conduct as a matter of law, as required to impose liability for intentional infliction of emotional distress, the court having properly focused on the conduct on which M's claim was based and the manner in which the plaintiff undertook his campaign to harm M's personal and professional reputation, rather than the generalized characterizations of that conduct, regardless of the motivation behind it.

Argued May 25—officially released August 15, 2017

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendants filed a counterclaim; thereafter, the matter was transferred to the judicial district of Hartford, Complex Litigation Docket, and tried to the court, *D. Sheridan, J.*; judgment in part for the plaintiff on the complaint and in part for the defendants on the counterclaim, from which the plaintiff appealed and the defendants cross appealed to this court. *Affirmed.*

*Christopher A. Klepps*, with whom was *Richard D. Carella*, for the appellant-appellee (plaintiff).

*Melissa S. Harris* and *Michael F. Dowley*, for the appellees-appellants (defendants).

*Opinion*

SHELDON, J. In this case arising from a home construction contract, both parties appeal from the judgment of the trial court. The plaintiff, Joseph Cohen, brought this action against the defendants, Robert M. Meyers and Robert M. Meyers, Inc. (RMMI), stemming from a contract for the construction of a new home to be built by RMMI on a lot of land that Cohen had owned for many years prior to entering into said contract. Cohen's nine count revised complaint alleged the following claims against Meyers: breach of contract, fraud,

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unjust enrichment, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., statutory theft in violation of General Statutes § 52-564, and conversion. Cohen alleged the following claims against RMMI: breach of contract, rescission, and violation of CUTPA. The defendants filed an answer denying Cohen's allegations or leaving him to his proof, set forth various special defenses, and asserted counterclaims for breach of contract, defamation, and intentional infliction of emotional distress. Cohen denied the special defenses advanced by the defendants in response to his complaint. Cohen also denied or left the defendants to their proof as to their counterclaims and asserted special defenses to those counterclaims, claiming abandonment and fraud as to the breach of contract counterclaim, and truth and privilege as to the defamation counterclaim. The defendants denied Cohen's special defenses.

After a bench trial, the court, *D. Sheridan, J.*, filed a memorandum of decision in which it found in favor of Cohen on his CUTPA claim against RMMI, and awarded damages on that claim in the amount of \$54,750. The court rejected all of Cohen's additional claims against the defendants. The court found in favor of RMMI on its counterclaim for breach of contract, but found that it had failed to prove damages resulting from that breach, and thus awarded it nominal damages in the amount of \$1. The court found for Meyers on his defamation claim and awarded him noneconomic damages in the amount of \$100,000. The court found in favor of Cohen on the defendants' counterclaim for the intentional infliction of emotional distress. The court declined to award punitive damages to either party.

On appeal, Cohen challenges the court's judgment in favor of Meyers, individually, on his claims for fraud and violation of CUTPA, asserting that the court erred in declining to pierce RMMI's corporate veil. Cohen

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also claims that the court improperly held him liable for defamation because his speech was protected by the first amendment, he did not make any of the allegedly defamatory statements against Meyers with actual malice, the court employed the wrong legal standard in determining the issue of malice, and each of his allegedly defamatory statements was substantially true even though the burden of proof was assertedly on Meyers to prove that they were not.

In their cross appeal, the defendants first claim that the court erred in awarding damages on the plaintiff's CUTPA claim against RMMI because he failed to prove that he suffered any actual loss or injury as a result of the CUTPA violation. Meyers also claims that the court erred in failing to award punitive damages on his defamation claim and in rejecting his claim for intentional infliction of emotional distress. We affirm the judgment of the trial court.

The trial court found the following relevant facts. "In October, 1999, Cohen bought a parcel of undeveloped land within the town of Chester . . . known as 11 Kings Highway, with the intention of someday building a single-family home upon the property.

"At the time of Cohen's purchase of . . . 11 Kings Highway, a 'driveway' surfaced with sand and crushed gravel and protected by adjacent drainage swales, had been in place since 1987. When Cohen bought the lot in 1999, his 'understanding' was that the land was 'a fully buildable lot,' with approvals in place. Cohen also referred in his testimony to the property as an 'approved building lot.' The only additional permit or approval he understood he needed prior to commencing construction was for a septic system, which would require a satisfactory percolation test. Cohen testified that, based on discussions with the Chester zoning enforcement officer, which occurred in 1999 and again in 2002, he

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continued to believe that—except for septic—all approvals were in place and he ‘had no concerns’ about his ability to build a house on the property using the existing driveway for access and the existing drainage swales for erosion control.

“In 2005, the town of Chester Planning and Zoning Commission adopted new driveway regulations. While the existing driveway on the 11 Kings Highway property in Chester met the town’s driveway requirements in place from 1987 to 2005, it did not comply with the requirements adopted in 2005.

“In April, 2009, Cohen undertook to obtain a percolation test and septic design for the property, which was later approved. Around the same time, Cohen hired designer Brian Buckley to prepare plans for a single-family home to be built on his property in Chester. Buckley provided Cohen several names of general contractors to consider for the construction of the home, one of which was RMMI. At that time, in April, 2009, RMMI possessed a valid new home construction contractor (‘NHCC’) registration.

“Robert M. Meyers is the president and sole shareholder of RMMI. At all times RMMI acted through Meyers, and Meyers has admitted that he had ‘complete control and domination of all business and fiscal policies and procedures’ of the corporation.

“Beginning in April, 2009, there was an exchange of e-mail correspondence between Cohen and Meyers, on behalf of RMMI, which continued sporadically through January, 2010. During that time period, on October 1, 2009, RMMI’s NHCC registration lapsed. Additional e-mails were exchanged from January 19, 2010 through July 28, 2010. During this time period, the parties worked out the basic aspects of their agreement, and RMMI provided a draft of a contract to Cohen. Of course, RMMI did not possess a valid NHCC registration

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while making any of these communications or conducting these negotiations.

“In the last days of July, 2010, it became apparent that Cohen prepared to move forward with the building of the house. In preparation for the anticipated contract with Cohen, Meyers, on behalf of RMMI, took several actions. First, he reached an agreement with Cohen that the additional costs of land-clearing beyond that specified in their proposed written agreement would be split fifty-fifty. Cohen paid the sum of \$1250 directly to the contractor, Stanley Burr, for one half the additional cost of the site-clearing cost of the property. Second, on July 30, 2010, Meyers renewed RMMI’s NHCC registration. Third, on July 30, 2010, Meyers opened a commercial checking account at Citizens Bank in the name of RMMI.

“On August 2, 2010, Cohen and RMMI signed the written ‘Agreement,’ which is appended to the complaint and was exhibit 1 at the trial. The first paragraph of the agreement clearly and explicitly states that the contracting parties are Cohen and RMMI:

“AGREEMENT

“This Agreement, made on this 2nd day of Aug. 2010, by and between Joseph M. Cohen (‘Owner’) of 1060 Shermer Rd. Apt. 16 Northbrook, IL 60062-3736 and Robert M. Meyers, Inc. of 843 Haddam Quarter Rd. Durham, Connecticut (‘Builder’).

“Consistent with this recitation, the agreement is signed—once again clearly and explicitly—by RMMI, acting through its President, Robert M. Meyers. . . .

“Certain provisions of the agreement are especially pertinent to this dispute and it is worthwhile to set them out here in full:

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“1. *DWELLING*: The Builder shall perform the work and supply all the materials to construct a single family dwelling on the property with all site improvements substantially in accordance with SCHEDULE A, the house drawing plan and Site plan. And SCHEDULE B, the specifications. (Such dwelling shall be referred to as ‘dwelling.’) The Builder reserves the right to: (i) substitute any materials of like or better quality; (ii) make minor deviations from the drawing/plans and specifications; and (iii) in the event that there is a discrepancy between the drawing/plan and the specifications, the specifications shall control.

. . .

“3. *PRICE AND PAYMENT SCHEDULE*: The Owner agrees to pay the Builder the sum of \$229,000.00 for the construction of the Dwelling and site improvements, time being of the essence regarding the date of payment. The price shall be paid as follows:

- a. \$50,000.00 Upon execution of this agreement.
- b. \$40,000.00 Upon installation of septic system and digging hole for foundation.
- c. \$40,000.00 Upon pouring foundation and back-filling.
- d. \$40,000.00 Upon the main structure being framed and roofing installed.
- e. \$30,000.00 Upon siding and gypsum board being installed and rough mechanics being installed.
- f. \$20,000.00 Upon installation of flooring, cabinets, and completion of interior painting and tile.
- g. Balance \$9,000.00 Upon obtaining a Certificate of Occupancy.

“Notwithstanding the foregoing if a Certificate of Occupancy is not issued as a result of anything outside of this agreement, then the final payment shall be due as if the Certificate of Occupancy was issued on the date the Certificate of Occupancy was denied.

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“In addition, the Owner acknowledges that there may be an additional cost not provided in this agreement for water service connection fees and Electric Power Company connection fees, including but not limited to any transformer, transformer Vaults, pull stations, etc., not shown on the site plan. . . .

“12. *ENTIRE AGREEMENT*: The Parties acknowledge that this agreement contains the entire understanding, terms, and conditions between the parties. This agreement cannot be changed orally, but only by agreement in writing signed by the party against whom enforcement of any waiver, change, modification, or discharge is sought. . . .

“15. *REPRESENTATIONS*: In addition to any other warranties or representations contained in this agreement, the Owner warrant[s] and represent[s] to the builder that:

a. The property is an approved building lot and the builder will be able to obtain a building permit upon application and without having to comply with any special requirements of Planning and Zoning, inland-wetlands commission, or any other governmental or quasigovernmental agency having jurisdiction over this property except as set forth in this agreement.

“At the time of the signing of the agreement, Cohen issued a check to RMMI for \$50,000 in accordance with the ‘PRICE AND PAYMENT SCHEDULE’ of the agreement. The check was deposited into the Citizens Bank commercial checking account that had been opened a few days earlier.

“Prior to entering into the agreement, RMMI did not provide the plaintiff a written notice pursuant to the New Home Construction Contractors Act [(NHCCA)],

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Connecticut General Statutes § 20-417d (A), advising [Cohen] to (a) contact the Department of Consumer Protection regarding the contractor's registration status; (b) to inquire into whether any complaints had been filed against the contractor; and (c) to request a list of consumers of new homes constructed to completion by the contractor.

"At the time the agreement was signed, RMMI had been the subject of new home construction complaints to the Department of Consumer Protection . . . in 2001, 2004, 2006, and 2008.

"After signing the contract and receiving the first payment, RMMI commenced work at the site, including land-clearing, blasting, excavation, and placement of temporary forms. When laying out and excavating for the foundation footings for the house, RMMI rotated or 'pivoted' the axis of the foundation to avoid a rock outcropping. When Cohen learned of this, he expressed great concern, since the orientation of the house had been precisely planned so as to maximize the view from the house over the Connecticut River valley.

"On August 31, 2010, after receiving Cohen's concerns and complaints about the rotation of the foundation, Meyers informed Cohen in an e-mail that, 'Joe, if you want the foundation moved back, I will call the concrete contractor and have him move it back.'

"On August 10, 2010, Meyers went to the Chester town hall to file an application for a building permit. The Chester zoning enforcement officer, Judith R. Brown, informed Meyers that a building permit could not be issued because a driveway permit was required in order to obtain a building permit. Brown also required that Meyers file applications for a zoning permit and a driveway permit. A great deal of communication between Cohen and various town officials ensued, with Cohen pleading his case to all involved that the driveway

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should be ‘grandfathered’ and he should not be required to obtain a driveway permit.

“Despite Cohen’s efforts, on September 1, 2010, the application for a driveway permit was denied because it did not meet the driveway standards set forth in the 2005 driveway regulation. On September 7, 2010, after meeting with the town engineer, Cohen sent an e-mail to the various town officials requesting a waiver of the driveway regulations. On September 13, 2010, Cohen filed a formal application for the driveway waiver with the Board of Selectmen of the town of Chester.

“On September 21, 2010, the driveway waiver application was considered at a Board of Selectmen meeting that was attended by Cohen and Meyers. The waiver was denied pending information regarding turning radius requirements for emergency vehicles. On October 5, 2010, the waiver of the driveway regulations was approved at a meeting of the Board of Selectmen.

“On October 6, 2010, [Brown] wrote a letter to Cohen stating that the waiver was approved, but that before he could start driveway improvements, he was to arrange a preconstruction meeting with the driveway contractor, herself, and the town engineer, pay a \$25 application fee, post a driveway bond in the amount of \$1500, and provide a certificate of insurance prior to the issuance of a zoning permit.

“On October 8, 2010, Cohen sent an e-mail to Meyers, which attached a detailed list of ‘issues for discussion’ before restarting construction on the project. The list included driveway issues, building permit ‘problems,’ and various other items that Cohen claimed had increased the project cost by 5 to 10 percent. Cohen’s list suggested a variety of paths to ‘move forward,’ ranging from shutting down construction temporarily or permanently, to completing the construction as quickly as possible, to entering into a new contract. In reply to

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Cohen's e-mail, Meyers stated that he was not responsible for the delay or the permit or driveway issues, and declared that Cohen was in breach of the contract, stating: '[t]his delay is costing me time and money. Reminder: You represented to me by contract that you have [an] approved building lot and that I should not have to be caused a delay from the town government. . . . Without a building permit, approved site plan and adjusted contract, this job is [stopped] and you remain in breach of contract.'

"For the next week, Cohen and Meyers continued to exchange e-mails blaming each other for various delays, discrepancies, problems, and cost overruns on the project. Cohen attempted to get Meyers to meet with the town and restart the building process, but Meyers refused to do so unless he could move forward with the existing contract 'without issues.' He interpreted Cohen's insistence on discussing topics such as delay and increased cost as 'nothing more than you trying to get me to pay for your misfortune.'

"On October 25, 2010, Cohen sent a certified letter to Meyers stating that the contract was 'under review' and directing him not to perform any additional work, make any expenditures, or order materials or services related to 11 Kings Highway.

"On November 10, 2010, [Brown], the Chester zoning enforcement officer, returned the building permit application and checks to Meyers because she had been advised by Cohen that 'he will not be going forward with his plans to build at 11 Kings Highway at this time.'

"Ultimately, on December 1, 2010, Cohen notified RMMI via certified letter that the contract was terminated for cause.

"Cohen then embarked upon a relentless pursuit of his grievances against Meyers that has continued

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unabated to the present. The catalog of e-mails, letters, newspaper articles, and other writings which memorialize long and bitter conflict is impressive in its dimensions and in its vitriol. What follows are excerpts which are particularly relevant to the issues in this lawsuit.

“On January 17, 2011, in an e-mail to Mr. Meyers, Mr. Cohen stated:

“ ‘Please share the following with your wife and your attorney: Time is up—this week I begin filing formal complaints and notifying officials in all Connecticut River Valley Durham and surrounding towns about my dispute with you. I also intend to [take out] an ad in the Middletown Press and other publications (I am 100 [percent] serious). When I call you out as a liar, cheat, thief and lawbreaker—it will all be true! When your wife comes home from work at Middlesex Memorial saying she is humiliated; when your children ask what is wrong with you; when your neighbors (who I contact by mail) start staring at you strangely, you will know you blew your last chance to fix things. And every building official and state official in the Durham-Meriden-East Haddam corridor will have your number. As for being a licensed building inspector—I doubt it since I will track you and make sure every community gets a full accounting of your track record . . . . I will be visiting officials with formal letters of complaint in East Haddam, Durham and Meriden as soon as possible. You are going to be under the gun of officials and the public. . . . [You have] left me no choice but to make you pay for it.’

“On January 18, 2011, Mr. Cohen began exchanging e-mails with George P. Gombossy, a syndicated consumer columnist for numerous Connecticut newspapers. Cohen told Gombossy:

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“ ‘thanks for getting involved in this. meyers’ llc includes his wife, so I am going to put her name and work affiliation in everything I do going forward. i have a feeling when middlesex memorial sees their name getting trashed with an employee’s they may put the screws to her.’

“(Lowercase in original.)

“On January 19, 2011, Cohen sent another e-mail to Meyers, stating:

“ ‘Your stupidity is overwhelming. I have tried to be nice to you because you are a small man without much of a life. What little you have is about to be diminished. . . . When you are sitting around with no work or selling light bulbs at the local store, remember you blew any chance you had to salvage your reputation.’

“In the wake of these e-mails, as he suggested he would, Cohen began communicating with various state and local officials regarding Meyers. He also, as he suggested he would, began to include Meyers’ wife, Christine A. Meyers, as part of his communications and requests for information. Cohen justified his efforts directed at Christine Meyers because she was a secretary of RMMI and Meyers’ ‘business partner.’ The former is true, but as to the latter, no competent evidence was submitted as to any active participation by Mrs. Meyers in any of the business affairs of RMMI, or in the construction project at 11 Kings Highway.

“On January 19, 2011, Cohen forwarded a Freedom of Information Act (‘FOIA’) [General Statutes § 1-200 et seq.] request to Richard McManus, building official for Durham (copied to Laura Francis, first selectman), requesting any and all building permits or other permits for construction or renovations issued or requested by Robert M. Meyers, Robert M. Meyers Inc., LLC, Robert

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Meyers, and Christine A. Meyers. Thereafter, Cohen met personally with McManus. Cohen also met with Keith Darin, then building official for East Haddam, to review files of houses built by RMMI.

“Cohen made a FOIA request directed to the Department of Consumer Protection, asking for all complaints against RMMI and Meyers. On January 31, 2011, Cohen filed a complaint with the Department of Consumer Protection related to the construction at 11 Kings Highway in Chester, but also alleging that Meyers performed new home construction, while not registered, at 24 Alger Road, in East Haddam. . . . [Cohen] began to exchange e-mails with Terence Zehnder, the investigator for the Department of Consumer Protection, and in a March 29, 2011 e-mail to Zehnder, stated, ‘Meyers is stubborn, not smart, arrogant and has gotten away with pulling crap for years.’ To resolve [Cohen’s] complaint, RMMI provided an assurance of voluntary compliance to the commissioner of the Department of Consumer Protection and paid a civil penalty of \$250 on April 19, 2011.

“On January 3, 2012, Cohen sent a three page letter to the Middlefield Board of Selectmen, stating, ‘[i]t is my belief [Meyers] is a liar, cheat, commits fraud, steals, is not competent as a builder, and lacks proper respect for the law. Robert Meyers has . . . [w]orked (in 2009/2010) as a builder while not registered/licensed (a criminal offense) . . . [p]erformed construction work (2010) on a new house without getting a building permit . . . [a]llegedly threatened to kill a customer in a dispute over the customer’s house . . . [i]gnored another town’s building inspector and planned to go against his order (2010), created and submitted a fake document into a court proceeding (2011).’ Cohen also states: ‘Robert M. Meyers has disdain for the law, the court system and the truth. . . . [I]t is my experience and

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belief Robert M. Meyers is a dishonest, deceitful, incompetent contractor.’ Cohen thereafter went to a Middlefield Board of Selectmen meeting to read aloud the content of his letter, and that appearance was reported by the press. On January 13, 2012, an article appeared in the ‘Town Times’ headlined, ‘Chester Resident Complains about Middlefield Building Inspector at Selectmen’s Meeting,’ reporting that Cohen stated that ‘Meyers does not have respect for the law, authority or the truth and felt he was fundamentally dishonest and deceitful.’

“On September 7, 2012, Cohen sent a letter to Joseph V. Cassidy, acting state building inspector, and copied the letter to Donald DeFronzo, acting commissioner of the Department of Construction Services; Daniel Tierney, deputy state building inspector; Attorney General George Jepsen; and William M. Rubenstein, commissioner of the Department of Consumer Protection. In the letter, Cohen stated: ‘I believe Mr. Meyers may have obtained his building inspector’s license under false pretenses and/or is not qualified to be licensed by the state of Connecticut.’ Cohen also stated that Meyers was guilty of ‘a serious criminal violation’ when he built and sold a new house at 24 Alger Road in East Haddam. In the letter, Cohen states that Meyers is ‘an alleged liar, cheat and thief—an admitted criminal who violated state building and consumer protection laws’; and [that] Meyers is ‘something of a Jekyll and Hyde personality: Charming until he gets your money, then a sociopath who enjoys taunting and threatening in response to legitimate questions about business practices, competence and integrity.’

“On September 27, 2012, Meyers was disclosed as an expert witness who was expected to be called at the trial of this case. The disclosure stated that Meyers ‘is expected to testify that, in his opinion, there was no violation of any codes regarding the work done by Mr.

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Meyers at the property subject to this lawsuit prior to the issuance of any building permit by the town of Chester. Mr. Meyers may also give his opinion that the town of Chester did not have any governing rules or regulations which would have resulted in a violation of the work done at the property prior to the issuance of a building permit by the town of Chester.’ . . .

“Upon learning of this expert disclosure, Cohen began a new, more aggressive and more strident round of communications with state and local officials, purportedly ‘to ascertain information related to Cohen’s prosecution in this case.’ . . .

“Cohen made a FOIA request to the [Department of Construction Services] (the state building inspector’s office) for documents related to Meyers’ service as a building official in East Haddam. After reviewing the response, on October 10, 2012, Cohen sent a letter to the state building official, in which he stated that Meyers had ‘a long history of consumer complaints and skirting the law’ . . . . He complained that Meyers ‘stole most of the \$53,500 I gave him . . . .’ He expressed a ‘personal belief’ that ‘Mr. Meyers is a liar, cheat, thief and incompetent as a builder and would not be deserving of a job in public service.’

“On October 16, 2012, Cohen spoke at a meeting of the Middlefield Board of Selectmen, stating, among other things, that Meyers was not registered as a new home construction contractor in 2009/2010 when he built a home at 24 Alger Road, a criminal violation of state law for which he was not prosecuted, and that at the time he passed the state test for the building official, he was not licensed and was in ‘serious criminal violation of the very rules he was charged with upholding.’

“On October 23, 2012, Cohen sent a letter to the first selectman of the town of Middlefield stating that Meyers had lied on his job application. In the letter, Cohen

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also stated that a customer had alleged that Meyers threatened to kill him.

“Cohen spoke again at a Middlefield Board of Selectmen meeting on November 5, 2012, again claiming that it was a criminal violation for Meyers to build the house at 24 Alger Road without licensing as a new home contractor.

“On November 26, 2012, Cohen sent another letter to the Middlefield Board of Selectmen, letting them know of the pending lawsuit and complaints lodged against Meyers, claiming that \$53,500 was ‘stolen’ and he was left only with a torn-up piece of property. Cohen stated: ‘[Y]ou cannot reason with a man who lies, cheats and steals with a cold heart; a man I know who will laugh in your face and taunt you, telling you he has your money and it is now his money . . . .’

“On April 10, 2013, Cohen sent a letter to Angie Martinez, a consumer information representative in the fraud division of the Department of Consumer Protection, stating, ‘[i]t is my contention now that Robert M. Meyers, doing business as Robert M. Meyers, Inc., had for the past decade or more operated an *ongoing criminal enterprise disguised as a building contracting business*. Mr. Meyers engaged in fraud, theft/larceny, embezzlement, violation of consumer protection laws, elder abuse and other criminal behavior . . . .’

“On April 29, 2013, Cohen wrote again to the first selectman of the town of Middlefield, stating: ‘I have been working with state and federal authorities to bring criminal and other actions against Mr. Meyers for alleged crimes including larceny, fraud and abuse—charges I believe Mr. Meyers is guilty of . . . I look forward to the day when news trucks are lined up outside your Town Hall building to conduct live broadcasts . . . Meyers, through his corporate entity . . . took money from me that Mr. Meyers apparently embezzled

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from his corporation and used for his personal expenses . . . Meyers lied, cheated and stole from [one of his customers, John Christopher, and his wife, Sarah] and that led to Mr. Christopher's death. It is an awful tale, but something not out of character when it comes to Mr. Meyers, who is one of the most despicable people I have ever come across.'

"Sometime in the summer of 2013, Cohen created an Internet website entitled 'Housebuilder from Hell; Robert 'Bob' Meyers' at the address [www.robertmeyer-sinfo.com](http://www.robertmeyer-sinfo.com). The website was paid for and maintained by Cohen, and consists of pages of text with limited graphics. Cohen confirmed that he has complete control over the content of the website. Several statements on the website are especially pertinent to this lawsuit:

- " 'Certainly, I did not make Meyers into what he is—a liar, thief cheat, incompetent and lawbreaker.'

- " 'Meyers, I learned in my query into his past, thinks it is okay to cheat on his wife, contract venereal disease, and advertise for dates on the Internet . . . '

- " 'Bob Meyers is a thug, a criminal and expert liar . . . '

- " 'Let me tell you some of the things Bob Meyers does not want you to know, all of which I would contend reflect on Meyers' poor moral character, his criminal and anti-social inclinations, and that confirm he is a liar and a cheat and a lawbreaker. They include . . .  
1. Bob Meyers had an affair while married. At some point, Bob Meyers contracted venereal disease . . . Since I know Bob Meyers at one point was trolling the Internet for women using my money, let this be a warning: practice safe sex (some venereal disease infections cannot be cured), and the safest sex is to choose your relationships carefully and take other precautions . . . '

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- “‘I did not know at the time that Meyers had a history of lawbreaking and complaints, that his wife had tired of his lack of ability to be a decent husband and partner in marriage, or that Meyers’ behavior was not unlike that of a criminal who refuses to accept responsibility for his actions.’

“The court credited Meyers’ testimony that he has been affected physically, mentally, and emotionally by Cohen’s conduct. Meyers testified to sleepless nights, anxiety, tremendous stress, jitters, night sweats, a pit in his stomach, and constantly worrying what would happen next. Meyers testified that he often goes home, closes the blinds, seals himself in and pulls a blanket over his head. He admitted to thoughts of suicide as a way to ‘stop all of the pain.’ He summed up his situation by remarking that Cohen’s accusations of him killing a man, and being a liar, a thief and a criminal have turned his life into ‘a pile of crap.’ Meyers’ changes in behavior, outlook, and demeanor over the past few years were corroborated by the testimony of various friends and relations.” (Citations omitted; emphasis in original; footnotes omitted.)

On the basis of the foregoing facts, and additional facts that will be set forth as necessary, the court concluded, *inter alia*: “RMMI’s failure to register with the Department of Consumer Protection as a new home construction contractor under the NHCCA, while at the same time negotiating a contract for new home construction, is a violation of the [NHCCA]. RMMI’s failure to provide the plaintiff with the written notice required by § 20-417d (A) prior to entering into the agreement is also a violation of the NHCCA. A violation of the NHCCA, General Statutes § 20-417a et seq., constitutes a *per se* violation of [CUTPA]. As a result of the CUTPA violation established in count seven, the plaintiff is entitled to ‘actual damages’ under General

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Statutes § 42-110g (a).” The court credited Cohen’s testimony that “he would have acted differently had he received proper NHCCA disclosures from RMMI,” and thus [rendered] judgment in favor of Cohen against RMMI, and awarded him actual damages in the amount of \$54,750 on his CUTPA claim. The court found in favor of RMMI on its counterclaim for breach of contract, but found that damages were not proven and thus awarded nominal damages in the amount of \$1. The court found in favor of Meyers against Cohen on his defamation claim and awarded Meyers noneconomic damages in the amount of \$100,000. The court rejected the parties’ remaining claims against each other.<sup>1</sup>

The parties thereafter filed motions to reargue. First, Cohen sought reargument, *inter alia*, on the grounds that the court erred in summarily dismissing his claims for fraud, unjust enrichment, statutory theft and conversion against Meyers individually. Cohen argued that the court erred in declining to pierce the corporate veil and to hold Meyers individually liable for his conduct, and that its decision was inconsistent, in that it “concluded that RMMI violated a statutory duty by failing to comply with the NHCCA in violation of CUTPA [but] . . . that Meyers did not use the corporate form to violate a statutory duty or perpetuate a fraud.” Cohen argued: “[T]he court’s express findings that Meyers had complete control and domination over RMMI, that RMMI violated an express statutory duty and engaged in unfair and deceptive practices, and that such violation was the cause of the plaintiff’s damages, necessitates a finding that Meyers used the corporate form to violate a statutory duty.”

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<sup>1</sup> The court noted that Cohen had expressed his intention to withdraw his rescission claim, but had never formally done so. On the basis of that stated intention, the court rendered judgment in favor of Meyers on that claim. That ruling has not been challenged on appeal.

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The court disagreed, and issued an order on December 3, 2015, holding, *inter alia*: “[T]he court rejects [Cohen’s] contention that the facts found by the court in its memorandum of decision necessarily compel a finding that Meyers used his control and domination of the corporation to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [Cohen’s] legal rights.”

Meyers sought reargument of the court’s refusal to award him punitive damages on his defamation claim and challenging the court’s finding that Cohen’s actions were not so extreme and outrageous as to support a claim of intentional infliction of emotional distress. The court denied Meyers’ motion.

This appeal and cross appeal followed. Additional facts will be set forth as necessary.

## I

## PLAINTIFF’S APPEAL

## A

Cohen first claims that the court erred in declining to pierce the corporate veil of RMMI, and thus to hold Meyers personally liable for fraud and violation of CUTPA. We are not persuaded.

“A court’s disregard of an entity’s structure is commonly known as piercing the corporate veil.” (Internal quotation marks omitted.) *Litchfield Asset Management Corp. v. Howell*, 70 Conn. App. 133, 148 n.10, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). “Ordinarily the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice.” (Internal quotation marks

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omitted.) *Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc.*, 187 Conn. 544, 557, 447 A.2d 406 (1982). “Whether the circumstances of a particular case justify the piercing of the corporate veil presents a question of fact. . . . Accordingly, we review the trial court’s decision whether to pierce [a party’s] corporate veil under the clearly erroneous standard of review.” (Citations omitted; internal quotation marks omitted.) *Naples v. Keystone Building & Development Corp.*, 295 Conn. 214, 234, 990 A.2d 326 (2010).

We have recognized two tests for disregarding a defendant’s corporate structure: the instrumentality rule and the identity rule. On appeal, Cohen claims that he satisfied the requirements of the instrumentality rule, and thus that the court erred in declining to pierce the corporate veil.<sup>2</sup> “The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff’s legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.” (Internal quotation marks omitted.) *Id.*, 232.

In declining to pierce RMMI’s corporate veil under the instrumentality rule, the trial court explained: “It is admitted that Meyers singlehandedly owned and operated RMMI on a day-to-day basis. But, the fact

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<sup>2</sup> The trial court also declined to pierce RMMI’s corporate veil pursuant to the identity rule. Cohen has not challenged that ruling.

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that a sole stockholder of a corporation is in exclusive control of the company's finances and business practices, standing alone, is an insufficient basis in itself to pierce the corporate veil. While control is a factor, '[o]f paramount concern is how the control was used, not that it existed.' . . .

"In this respect, [Cohen] has failed completely to offer any evidence that Robert M. Meyers, the individual, used the corporate form to perpetrate a fraud. The evidence offered by [Cohen] does not justify transforming a breach of contract claim against a corporation into a personal obligation of the corporation's principal. . . .

"[Cohen] offered no evidence to suggest that Meyers did not respect and observe the laws which afford him the right to form and manage a corporation of which he was the sole shareholder. RMMI had its own accounts, made payments to and from those accounts and conducted regular business as a general contractor, and apparently existed for years on its own, separate and distinct from . . . Meyers as an individual. Granted, the plaintiff offered evidence that funds from the RMMI account were used to pay bills of Meyers that he should have paid personally. But, Robert Gollnick . . . RMMI's accountant, testified that all those payments were accounted for and reflected on the balance sheet as loans to a company officer. Eventually, Meyers had to put money back into the corporation to offset the personal payments that were made from [the] corporation. In sum, [Cohen]'s evidence that . . . Meyers used the corporate form as a vehicle to commit fraud or dishonest acts consists of vague allusions and speculation, and thus was completely unpersuasive."

The court thus concluded that Cohen had "offered insufficient evidence to satisfy . . . the instrumentality . . . test," and thus rejected his attempt to pierce RMMI's corporate veil.

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On appeal, Cohen claims that he satisfied the instrumentality test, and thus that the court should have pierced the corporate veil and held Meyers individually liable for violating CUTPA. Cohen's claim is based upon the same argument that he raised in his motion to reargue—that the trial court's determination that he failed to prove that Meyers exercised his control over RMMI to commit fraud or wrong or to perpetrate the violation of a statutory or other positive legal duty is inconsistent with its determination that RMMI, while under the control of Meyers, violated a statutory duty to Cohen under the NHCCA. In other words, Cohen contends that the trial court's own factual findings proved that he satisfied the instrumentality test. The court summarily rejected "[Cohen's] contention that the facts found by this court in its memorandum of decision necessarily compel a finding that Meyers used his control and domination of the corporation to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [Cohen's] legal rights." Although the court determined that RMMI had failed to comply with the NHCCA, and that that failure constituted a violation of CUTPA, the court concluded: "The plaintiff's proof in this case did not establish wilful, malicious, immoral or deceitful conduct." The court's determination that Cohen failed to satisfy the instrumentality test is supported by the record and he fails now, as he did before the trial court, to demonstrate that RMMI "did not serve a legitimate business purpose, or that failing to pierce its corporate veil and hold [Meyers] personally responsible would perpetrate a fraud or other injustice." We therefore cannot conclude that the court's ruling was clearly erroneous.

## B

Cohen also challenges the court's judgment against him on Meyers' counterclaim for defamation. By way of

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special defense to Meyers' counterclaim, Cohen alleged that he should not be held liable for defamation because his remarks concerning Meyers were true. Cohen also alleged that his remarks were privileged based upon his "right to bring forth complaints to the Department of Consumer Protection regarding the unscrupulous and unlawful actions of [Meyers] which violate consumer protection statutes" and his right to make such statements in prosecuting this action. Cohen also argued, in his posttrial brief, that his statements regarding Meyers involved matters of public concern and thus were constitutionally protected.<sup>3</sup> The trial court found that Cohen's statements regarding Meyers were defamatory per se. The court further found that Cohen's arguments in defense of those statements unavailing. We agree with the trial court.

We begin by setting forth the general principles of law that are pertinent to our analysis of Cohen's challenge to the trial court's defamation ruling against him. "A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . ." (Internal quotation marks omitted.) *Gleason v. Smolinski*, 319 Conn. 394, 431, 125 A.3d 920 (2015). "Defamation is comprised of the torts of libel and slander: slander is oral defamation and libel is written defamation." (Internal quotation marks omitted.) *Id.*, 430 n.30. To establish a prima facie case of defamation at common law, the plaintiff must prove that "(1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as

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<sup>3</sup> We note that Cohen did not plead that Meyers was a public official, that his statements involved a matter of public concern or public import, or that his speech was constitutionally protected.

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a result of the statement.” (Internal quotation marks omitted.) *Id.*, 430.

Statements deemed defamatory per se are ones in which the defamatory meaning of the speech is apparent on the face of the statement. *Battista v. United Illuminating Co.*, 10 Conn. App. 486, 491–92, 523 A.2d 1356, cert. denied, 204 Conn. 802, 803, 525 A.2d 1352 (1987). Our state has generally recognized two classes of defamation per se: (1) statements that accuse a party of a crime involving moral turpitude or to which an infamous penalty is attached, and (2) statements that accuse a party of improper conduct or lack of skill or integrity in his or her profession or business and the statement is calculated to cause injury to that party in such profession or business. See *Moriarty v. Lippe*, 162 Conn. 371, 383–84, 294 A.2d 326 (1972) (slander per se); *Proto v. Bridgeport Herald Corp.*, 136 Conn. 557, 565–66, 72 A.2d 820 (1950) (libel per se).

“When the defamatory words are actionable per se, the law conclusively presumes the existence of injury to the plaintiff’s reputation. [The plaintiff] is required neither to plead nor to prove it.” (Internal quotation marks omitted.) *Lowe v. Shelton*, 83 Conn. App. 750, 766, 851 A.2d 1183, cert. denied, 271 Conn. 915, 859 A.2d 568 (2004). “Whether words are actionable per se is a question of law for the court . . . All of the circumstances connected with the publication of defamatory charges should be considered in ascertaining whether a publication was actionable per se. The words used, however, must be accorded their common and ordinary meaning, without enlargement or innuendo.” (Citations omitted.) *Miles v. Perry*, 11 Conn. App. 584, 602–603, 529 A.2d 199 (1987).

“It is well settled that for a claim of defamation to be actionable, the statement must be false . . . and under the common law, truth is an affirmative defense

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to defamation . . . the determination of the truthfulness of a statement is a question of fact . . . .” (Internal quotation marks omitted.) *Gleason v. Smolinski*, supra, 319 Conn. 431. “Contrary to the common law rule that required the defendant to establish the literal truth of the precise statement made, the modern rule is that only substantial truth need be shown to constitute the justification. . . . It is not necessary for the defendant to prove the truth of every word of the libel. If he succeeds in proving that the main charge, or gist, of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable. . . . The issue is whether the libel, as published, would have a different effect on the reader than the pleaded truth would have produced.” (Citations omitted; internal quotation marks omitted.) *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 112–13, 448 A.2d 1317 (1982).

“A defendant may shield himself from liability for defamation by asserting the defense that the communication is protected by a qualified privilege. . . . When considering whether a qualified privilege protects a defendant in a defamation case, the court must resolve two inquiries. . . . The first is whether the privilege applies, which is a question of law over which our review is plenary. . . . The second is whether the applicable privilege nevertheless has been defeated through its abuse, which is a question of fact. . . . In a defamation case brought by an individual who is not a public figure, the factual findings underpinning a trial court’s decision will be disturbed only when those findings are clearly erroneous, such that there is no evidence in the record to support them. . . . Finally, to the extent that a litigant challenges the legal standard that is required to establish that a privilege has been defeated, that issue is a question of law over which our review is plenary.” (Citations omitted.) *Gambardella v.*

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*Apple Health Care, Inc.*, 291 Conn. 620, 628–29, 969 A.2d 736 (2009).

“Qualified privileges may be defeated by a showing, by a preponderance of the evidence . . . of actual malice, also known as constitutional malice, or malice in fact.” (Citation omitted.) *Gleason v. Smolinski*, supra, 319 Conn. 433 n.32.<sup>4</sup> “Actual malice requires that the statement, when made, be made with actual knowledge that it was false or with reckless disregard of whether it was false. . . . A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth.” (Internal quotation marks omitted.) *Chadha v. Charlotte Hungerford Hospital*, 97 Conn. App. 527, 537–38, 906 A.2d 14 (2006). Malice is rarely subject to proof by direct evidence but is often proved only by inference through an accumulation of circumstantial evidence. With the foregoing legal principles in mind, we review the trial court’s findings and legal conclusions.

In considering Meyers’ defamation claim, and Cohen’s defenses to it, the trial court noted, *inter alia*: “There does not appear to be serious debate between the parties that the statements in question—that Meyers is a ‘cheat,’ ‘thief,’ ‘liar,’ ‘admitted criminal,’ and incompetent building contractor, or that he caused the death of a customer, cheated on his wife, or contracted a venereal disease—if false, and if not protected by a privilege, would be considered defamatory. The statements, considered separately or in combination, would certainly expose a person to scorn or contempt, cause him to be avoided, or injure him in his business or trade.”

The court parsed Cohen’s various statements regarding Meyers into three categories: those that accused

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<sup>4</sup> “[T]he clear and convincing evidence standard furnishes the applicable standard of proving actual malice to sustain an award of punitive damages to a private figure plaintiff.” *Gleason v. Smolinski*, supra, 319 Conn. 433 n.32.

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him of a “crime involving moral turpitude or to which an infamous penalty is attached (e.g., ‘thief,’ ‘admitted criminal,’ or that he caused the death of a customer); those that accused him of improper conduct or lack of skill or integrity in his profession or business (. . . ‘cheat,’ ‘liar,’ and an incompetent building contractor)’; and those that fall into a grey area—namely, that Meyers cheated on his wife or contracted venereal disease.’” The court found that Cohen’s statements concerning Meyers were defamatory per se.

Turning to Cohen’s defense that all of his statements concerning Meyers were true or substantially true, the court first rejected Cohen’s argument that Meyers bore the burden of proving the falsity of the defamatory statements at issue herein, explaining that, having asserted truth as a special defense, it was his burden to prove the truth or substantial truth of those statements. The court then found: “Several defamatory statements of Cohen stretch the test for ‘substantial truth’ past its breaking point.”<sup>5</sup> The court thus concluded that

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<sup>5</sup> The court explained: “For example, Meyers wrote on his website, ‘House-builder from Hell,’ that ‘at some point, Bob Meyers contracted venereal disease’ and then warned women to ‘practice safe sex,’ implying that they may find themselves in a relationship with Meyers since . . . ‘I know Bob Meyers at one point was trolling the Internet for women . . . .’ Evidently, Cohen based this statement upon entries in the medical records of Meyers (obtained during discovery in this case) that showed he had undergone cauterization of genital warts, which, in the opinion of the doctor, were most likely caused by the human papillomavirus (HPV). True, HPV is primarily spread by sexual intercourse. But it also true that the majority of sexually active adults will be infected by HPV at some point in their lives.

“There is a vastly different impression upon the listener upon learning that a person ‘had treatment for genital warts’ as opposed to ‘contracted a venereal disease.’ In fact, putting aside the fact that all of this has nothing to do with Meyers’ competence as a builder, the court concludes that inflicting the stigma, humiliation and scorn attached to a ‘venereal disease’ upon Mr. Meyers, as opposed to relating any true state of facts, was exactly what Cohen intended by his statement. [Cohen] has failed to meet his burden of proving by a preponderance of the evidence that the statement [that] Meyers ‘contracted a venereal disease’ is substantially true, as that concept has been defined in the relevant case authority.

“In a similar fashion, Cohen’s repeated accusations that Meyers was a ‘thief’ were based on his sophism that Meyers ‘stole’ the \$53,500 payment

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Cohen had not met his burden of proof as to the special defense of truth, and that recovery for defamation was not precluded on that basis.

The court then went on to address Cohen's claims of privilege. The court rejected those claims, finding as

under the contract. Words claimed to be defamatory are given their natural and ordinary meaning and are taken as reasonable persons would understand them. *Ventresca v. Kissner*, 105 Conn. 533, 535, 136 A. 90 (1927). A reasonable person would understand the descriptive term, 'thief,' to apply to a person who commits the crime of theft; someone who wrongfully, stealthily—and sometimes violently—takes the property of another. A reasonable person would not ascribe the term, 'thief,' to a contracting party who has retained funds freely and voluntarily paid to it because of a dispute over who has breached the contract. The use of the word, 'thief,' by Cohen is fully intended to bring down more scorn and contempt upon Meyers than would be occasioned by a statement of the literal truth: 'a defendant in a lawsuit where a breach of a contract to build a house is alleged.' Other than the fact that Meyers retained the initial payment under the contract, the plaintiff offered no other evidence of 'thievery' by Meyers. The plaintiff has failed to prove by a preponderance of the evidence the substantial truth of his many public statements that Meyers is a 'thief.'

"Cohen's repeated references to Meyers committing 'criminal acts' or 'criminal violations,' or being an 'admitted criminal' or even that his contracting business was 'an ongoing criminal enterprise' are based on another fallacious argument. Because the New Home Construction Contractors Act provides for the imposition of criminal penalties in certain cases, and because Meyers has admitted he failed to comply with the NHCCA, Cohen stated that he is an 'admitted criminal'; that he has committed a 'criminal act'; and that his business is a 'criminal enterprise.' But the plaintiff offered no evidence that Meyers had ever been charged with a crime by any law enforcement agency, much less been convicted of a crime. An accusation that a person is 'a criminal' has always been a serious matter in our society. It is associated with behavior that is immoral, antisocial, evil, shameful and fundamentally wrong. Labeling Meyers as an 'admitted criminal' would create an impression in the mind of the listener many times more damaging than a literally true disclosure of the complete facts as to his violation of the NHCCA and the lack of any criminal charges or convictions. The plaintiff has failed to prove by a preponderance of the evidence the substantial truth of his many public statements that Meyers is a 'criminal' or committed 'criminal acts.'

"Finally, the evidence at trial never made quite clear what the factual basis was for Cohen's statement that Meyers 'cheated on his wife.' The court presumes it had its genesis in the fact that Meyers admitted that he had used an online dating service (match.com). The proof amounted to little more than supposition or conjecture and fell far short of a fair preponderance of the evidence, which is properly defined as the better evidence, the evidence having the greater weight, the more convincing force in your mind.

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follows: “The court believes that the direct and circumstantial evidence in the record of this case abundantly supports a finding that Cohen’s statements regarding Meyers stealing, committing criminal acts, causing a death, contracting venereal disease, and having extra-marital affairs were made with actual knowledge that they were false or with reckless disregard for whether they were false.”<sup>6</sup> The court further concluded: “Having

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. . . *Cross v. Huttenlocher*, 185 Conn. 390, 394, 440 A.2d 952 (1981).” (Footnote omitted.)

<sup>6</sup> The court stated: “As one example, Cohen, on more than one occasion, stated that the conduct of Meyers ‘caused’ or ‘led to’ the death in 2007 of one of his customers, John Christopher. The statement that John Christopher’s widow, Sandra Christopher, believes that the stress of dealing with the litigation with Meyers hastened John Christopher’s demise from cancer is, in all respects, true. The statement that ‘Meyers lied, cheated and stole from the Christophers and that led to Mr. Christopher’s death,’ is not. The latter statement declares a direct cause and effect relationship between the conduct of Meyers and the death of Mr. Christopher that is not warranted or justified by any credible, objective facts.

“Cohen had actual knowledge of the true state of facts. He was fully capable of accurately reciting the facts of Mr. and Mrs. Christopher’s story. In a November 26, 2012 letter to the selectmen of the town of Middlefield, Cohen mentions the fact that Mr. Christopher died at a ‘relatively young’ age without ever living in the ‘dream house’ that Meyers was to build. The letter tracks very closely the established facts regarding the dispute between the Christophers and Meyers, and nowhere in the letter does Cohen suggest that Meyers’ conduct ‘led to’ Mr. Christopher’s death. But, in a familiar pattern that would be seen in other contexts, Cohen’s subsequent communication about the subject strays farther and farther from the objective facts until, in the end, there is little truth in them at all.

“In an April 10, 2013 letter to Angie Martinez of the Department of Consumer Protection, Cohen stated that the lawsuit between Meyers and the Christophers ‘came to a conclusion when Mr. Christopher died fairly suddenly, perhaps in part because of Mr. Meyers’ actions.’ In vivid language from his website, ‘Housebuilder from Hell,’ Cohen tells of ‘law-breaking, building code violations, losses totaling many hundreds of thousands of dollars, the death of an aggrieved, home buyer, an alleged threat of extreme violence—and one man at the center of it all—contractor and state-licensed building inspector Robert M. ‘Bob’ Meyers.’ In a June 18, 2013 letter to the Commissioner of the Department of Consumer Protection, Cohen stated that ‘Meyers has caused not just terrible problems for consumers, but death, mayhem and other horrors.’ The manner and context in which these statements were delivered—in a writing (e-mail) as opposed to speech, and

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patiently and exhaustively reviewed the entire record, the court is persuaded that Cohen's departures from the truth were in fact motivated by spite or ill will—a burning desire to destroy Meyers personally and professionally that went far beyond aggressive litigation tactics or a good faith interest in protecting the public good. This is reflected at the very outset of this dispute in the January, 2011 e-mails he sent to Meyers and others when he promised to 'call you out as a liar, cheat, thief and lawbreaker. . . . You are going to be under the gun of officials and the public. . . . [You have] left me no choice but to make you pay for it' and continues throughout, right up until the vehement and caustic text of the 'Housebuilder from Hell' website. That publicly expressed intent to inflict harm, coupled with the fact that Cohen—when he wanted to—was fully capable of restricting his comments about [Meyers] to statements that were true, persuades the court that the accusation [that] Meyers 'caused' a death was deliberately made in purposeful avoidance of the truth.

"Without discussing in detail, the court finds that a similar analysis applies to Cohen's deliberate use of the terms 'thief' and 'criminal' to refer to Meyers, and his website's disclosure that Meyers 'cheated on his wife' and 'contracted a venereal disease.' These statements were all made in reckless disregard for whether they were false and in purposeful avoidance of the truth, as part of a cruel and vindictive effort to inflict injury upon Meyers. Actual malice has been proven to the court by a preponderance of the evidence; therefore, any conditional privilege has been lost, and recovery for defamation is not precluded."

In his posttrial brief, Cohen also claimed that his comments about Meyers were constitutionally protected because they were matters of public concern

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on multiple occasions, persuade this court that this was not a negligent misstatement of fact."

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“relating to both Meyers as a builder with whom multiple consumers had made prior complaints and a lawsuit, and Meyers as a building official using his office to obtain building code interpretations for his own benefit.” The court also rejected that claim, finding as follows: “[H]aving reviewed the entirety of the record and heard the testimony, the court concludes that, despite the important setting in which the statements were made, the content of the message and the context in which they were published makes it clear that they [were] not in furtherance of an uninhibited, robust, and wide open debate on matters concerning public affairs. Their purpose was solely to harass and humiliate Meyers and perhaps induce the town of Middlefield to prematurely end his employment, perhaps so as to avoid a public relations embarrassment. The statements were published against the background of a private business dispute that had mushroomed into a contentious, vitriolic, and extremely uncivil lawsuit. The court finds that Cohen’s remarks were part of an extended campaign of retaliation and revenge against Meyers that had everything to do with their private dispute, and little if anything to do with Meyers’ employment as building official or, for that matter, building officials in general. . . . [T]he statements were not ‘intended to persuade . . . with regard to a matter of public concern, [but] rather [to] merely torture [him] gratuitously with regard to a purely private matter.’ ”

The court thus concluded: “[T]he court finds that the speech in question is solely a contrived means for malicious harassment on a matter of private concern, and is therefore not entitled to protection under the first amendment to the [United States] constitution.”

On appeal, Cohen claims that the court improperly held him liable for defamation because his speech was protected by the first amendment, he did not make any of the allegedly defamatory statements with actual

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malice, the court employed the wrong legal standard in determining malice, and that he had proven that each of the allegedly defamatory statements was substantially true even though the burden of proof was on Meyers to prove that they were not.

We have examined the record on appeal and considered the briefs and the arguments of the parties, and conclude that the trial court properly ruled in favor of Meyers on his defamation claim against Cohen. Because the trial court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision on the defamation claim, as quoted extensively herein, as a proper statement of the facts and legal analysis on the issues raised in this appeal. Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff v. Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010).

## II

### DEFENDANTS' CROSS APPEAL

#### A

On cross appeal, the defendants first claim that the court erred in awarding damages on Cohen's CUTPA claim against RMMI because he did not prove that he had suffered any compensable injury as a result of RMMI's failure to comply with the NHCCA. The defendants argue that any injury suffered by Cohen was caused, instead, by his own refusal "to submit the driveway permit fee, bond and certificate of insurance in order to obtain a building permit and continue construction," and not their failure to make NHCCA disclosures. The defendants thus claim that the court erred in awarding damages on Cohen's CUTPA claim because he failed to prove that he suffered an injury or actual loss as a result of the CUTPA violation. We disagree.

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The trial court determined that, as a result of RMMI's CUTPA violation, Cohen was entitled to actual damages pursuant to § 42-110g (a), which provides in relevant part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. . . ." The court noted: "Actual damages under CUTPA have been defined to include loss and expenses incurred by the CUTPA plaintiff as a result of a violation of the act. *Prishwalko v. Bob Thomas Ford, Inc.*, 33 Conn. App. 575, 587, 636 A.2d 1383 (1994)."

With those legal principles in mind, the court credited Cohen's testimony that, "had he received the necessary disclosures from RMMI as required by the NHCCA, it is highly likely that he would not have contracted with RMMI, and would not have paid RMMI the sum of \$54,750." The court further explained that Cohen had little to show for the \$54,750 that he had paid to RMMI and that, if he had contracted with another party, it is reasonably probable that sum would have gone toward the cost of construction of a "completed home instead of a minimally excavated and prepared lot." The court thus awarded Cohen compensatory damages in the amount of \$54,750—representing out-of-pocket costs directly associated with the contract in question—for a violation of CUTPA.

The issue of whether Cohen suffered an ascertainable loss as a result of RMMI's CUTPA violation is a question of fact, which we review under the clearly erroneous standard. *D'Angelo Development & Construction Corp. v. Cordovano*, 121 Conn. App. 165, 182, 995 A.2d 79, cert. denied, 297 Conn. 923, 998 A.2d 167 (2010).

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Here, the court based its damages award on Cohen's testimony that he would not have signed the contract with RMMI in the first place if he had received the proper NHCCA disclosures, and thus awarded Cohen compensatory damages for the money he had paid to RMMI, for which he received little to no benefit. The court's conclusion is supported by the trial record. The fact that the contractual relationship between the parties ultimately deteriorated, and that, too, may have caused Cohen damages, is not a basis for concluding that the court's finding that RMMI's CUTPA violation proximately caused him damages was clearly erroneous.

B

Meyers also claims that the court erred in failing to award punitive damages on his defamation claim. We disagree.

"In awarding punitive damages . . . [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal absent a clear abuse of discretion." (Internal quotation marks omitted.) *Bhatia v. Debek*, 287 Conn. 397, 420, 948 A.2d 1009 (2008). "Such damages, however, are not awarded as a matter of right, but rather as a matter of discretion, to be determined by the [court] upon a consideration of all the evidence . . . ." (Internal quotation marks omitted.) *DeVito v. Schwartz*, 66 Conn. App. 228, 236, 784 A.2d 376 (2001).

In addressing the parties' claims for punitive damages, the court noted that it had considered all of the evidence presented at trial and declined to award punitive damages to either party. The court did not otherwise set forth the specific legal or factual bases for that decision. The court denied reargument sought by Meyers on his claim for punitive damages, explaining that reargument was unnecessary because it had

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already considered all of the factual and legal issues raised by Meyers in his motion to reargue when it rendered its November 12, 2015 decision. In the absence of specific details set forth by the trial court upon which it may have relied, and thus possibly erred, in declining to award punitive damages, we presume that it properly applied the law and did not abuse the wide discretion afforded to it in making that determination.

## C

Finally, Meyers claims that the court erred in rejecting his claim for intentional infliction of emotional distress. Meyers argues that the court erred in failing to find that Cohen's actions constituted extreme and outrageous conduct. We disagree.

"[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous." (Internal quotation marks omitted.) *Murphy v. Lord Thompson Manor, Inc.*, 105 Conn. App. 546, 552, 938 A.2d 1269, cert. denied, 286 Conn. 914, 945 A.2d 976 (2008).

"In order for the plaintiff to prevail in a case for liability . . . [alleging intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of

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his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. . . . Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) *Appleton v. Board of Education*, 254 Conn. 205, 210–11, 757 A.2d 1059 (2000).

In considering Meyers' claim for intentional infliction of emotional distress, the court noted that "[t]he 'conduct' that is identified as the cause of Meyers' emotional distress consists of written and verbal oral communication with various newspaper outlets, state officials, town officials and members of the public concerning Meyers' past history as a builder and contractor, his current licensure as a building official, and his employment as a building official for the town of Middlefield."

The court found that Cohen had engaged in "an intentional campaign—using permissible methods such as FOIA requests or open comments at public meetings—to drive a wedge between Meyers and his employer, the town of Middlefield. It was marked by tactless, abusive, and derogatory discourse, merciless provocation, and relentless scrutiny, all of which put Meyers under severe, unrelenting pressure." The court nevertheless found that "even if Cohen was engaged in a

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personal vendetta intended specifically to humiliate and harass Meyers or make him lose his job, the specific *conduct* of making defamatory remarks at public meetings, sending letters to government officials containing defamatory statements, and maintaining an Internet website with defamatory information, does not rise to the level of ‘extreme and outrageous conduct’—as that concept has been defined in the relevant case authority—necessary to impose liability for intentional infliction of emotional distress. The conduct that has been proven at trial is not extreme and outrageous as a matter of law, and therefore the cause of action for the intentional infliction of emotional distress must fail.” (Emphasis in original.)

Meyers claims that the trial court “erred by failing to consider Cohen’s overall pattern, series, course and/or accumulation of acts when determining whether Cohen’s actions were sufficiently extreme and outrageous as to constitute an intentional infliction of emotional distress . . . .” Meyers’ claim is belied by the trial court’s thorough and meticulous recitation of Cohen’s conduct. Indeed, the court considered Cohen’s conduct in its entirety, finding that he had undertaken a campaign that was designed to harm Meyers’ personal and professional reputation. The court nevertheless determined that the manner in which Cohen undertook that campaign against Meyers—through written and verbal statements impugning Meyers— was not extreme and outrageous. The court properly focused on the conduct on which Meyers’ claim was based, rather than by the generalized characterizations of this conduct, regardless of the motivation behind that conduct. His argument that the court erred in rejecting his claim for intentional infliction of emotional distress is unavailing.

The judgment is affirmed.

In this opinion the other judges concurred.

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ELLEN S. v. KATLYN F.\*  
(AC 38871)

Keller, Prescott and Bear, Js.

*Syllabus*

The defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for a civil protection order. The defendant claimed that the trial court improperly determined that there were reasonable grounds to believe that the defendant had stalked the plaintiff and would continue to do so in the absence of an order of protection. *Held* that the defendant's claim that the trial court improperly granted the plaintiff's application for a civil protection order was unavailing; because the defendant failed to obtain a memorandum of decision from the trial court and to include it in the appendix to her brief, and the transcript of the trial court proceedings that the defendant filed with the appellate clerk did not reveal a sufficiently detailed and concise statement of the court's findings, this court could not conclude, on the basis of the limited record before it, that the trial court committed any legal or factual error in reaching the decision that it did, as the scant record did not reflect the errors claimed by the defendant, and the trial court's ruling therefore was entitled to the reasonable presumption that it was correct.

Argued May 25—officially released August 15, 2017

*Procedural History*

Application for a civil protective order, brought to the Superior Court in the judicial district of New London and tried to the court, *Diana, J.*; judgment granting the application, from which the defendant appealed to this court. *Affirmed.*

*Cody A. Layton*, with whom, on the brief, was *Drzislav Coric*, for the appellant (defendant).

*Opinion*

PER CURIAM. The defendant, Katlyn F., appeals from the judgment of the trial court granting the application

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\* In accordance with our policy of protecting the privacy interest of the applicant for a protective order, we decline to identify the applicant or others through whom the applicant's identity may be ascertained.

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for a civil protection order filed by the plaintiff, Ellen S.<sup>1</sup> The defendant claims that the court improperly determined “that there were reasonable grounds to believe that the defendant had stalked the plaintiff and would continue to do so in the absence of an order of protection.” We affirm the judgment of the trial court.

The record reveals the following facts. On January 6, 2016, the plaintiff filed an application for an order of civil protection against the defendant. In her application, she alleged in relevant part that she had been the victim of stalking. In her application, she described two occasions in which she was subjected to what she characterized as “immature behavior” by the defendant. On one occasion, the defendant yelled at her and almost overturned a table in her direction. On the other occasion, the defendant shoved her using both hands. She alleged that other encounters had occurred, but did not provide details about them. The plaintiff requested that the court order that the defendant (1) not assault, threaten, abuse, harass, follow, interfere with or stalk her; (2) stay away from her home; (3) not contact her in any manner; and (4) stay 100 yards away from her. The court granted the application and issued an ex parte civil protection order.

The court held a hearing on the application on January 19, 2016. This was a joint hearing during which the court also considered an application for a civil restraining order against the defendant that was brought by the plaintiff’s boyfriend, the court’s denial of which is not a subject of this appeal. It was not disputed that the plaintiff’s boyfriend is the defendant’s former boyfriend. At the hearing, the plaintiff testified with respect to four separate and distinct incidents, which occurred during an approximately three year

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<sup>1</sup> The plaintiff did not file a brief in connection with this appeal. We consider the appeal on the basis of the defendant’s brief and the record.

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period of time, involving herself and the defendant: the first incident occurred at a restaurant referred to as the Harp and Dragon in December, 2015; the second incident occurred at a restaurant referred to as Hot Rod's in December, 2014; the third incident occurred at an establishment referred to as the Oasis Pub; and the fourth incident occurred at a friend's house in the summer of 2014. At the hearing, the court heard testimony from the plaintiff, the plaintiff's boyfriend, the defendant, and a mutual friend of the parties. At the conclusion of the hearing, the court granted the plaintiff's application. The court ordered that the defendant "not assault, threaten, abuse, harass, follow, interfere with or stalk the [plaintiff] with regard to that matter. That order is [going to] be in effect for six months from this date . . . ." <sup>2</sup> This appeal followed.

The defendant argues that, in granting the plaintiff relief under General Statutes (Rev. to 2015) § 46b-16a, <sup>3</sup>

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<sup>2</sup> The expiration of a six month domestic violence restraining order issued pursuant to General Statutes § 46b-15 does not render an appeal from that order moot due to adverse collateral consequences. *Putman v. Kennedy*, 279 Conn. 162, 164–65, 900 A.2d 1256 (2006). We apply that principle to the order of civil protection here.

<sup>3</sup> General Statutes (Rev. to 2015) § 46b-16a provides in relevant part: "(a) Any person who has been the victim of sexual abuse, sexual assault or stalking, as described in sections 53a-181c, 53a-181d and 53a-181e, may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such abuse, assault or stalking and does not qualify to seek relief under section 46b-15.

"(b) The application shall be accompanied by an affidavit made by the applicant under oath that includes a statement of the specific facts that form the basis for relief. Upon receipt of the application, if the allegations set forth in the affidavit meet the requirements of subsection (a) of this section, the court shall schedule a hearing not later than fourteen days from the date of the application. If the court is closed on the scheduled hearing date, the hearing shall be held on the next day the court is open and any ex parte order that was issued shall remain in effect until the date of such hearing. If the court finds that there are reasonable grounds to believe that the respondent has committed acts constituting grounds for issuance of an order under this section and will continue to commit such acts or acts designed to intimidate or retaliate against the applicant, the court, in its

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the court erroneously found that there were reasonable grounds to believe that she committed acts to warrant issuance of the civil protective order and that she will continue to commit such acts or acts designed to intimidate or retaliate against the applicant. The defendant argues that the court “erred in its interpretation of and application of the law to the facts.” In so doing, the defendant first argues that it is reasonable to infer that the court based its decision on a finding that she committed acts constituting stalking in the second degree as described in General Statutes (Rev. to 2015) § 53a-181d,<sup>4</sup> and, she argues, the evidence presented at the

discretion, may make such orders as it deems appropriate for the protection of the applicant. If the court finds that there are reasonable grounds to believe that an imminent danger exists to the applicant, the court may issue an ex parte order granting such relief as it deems appropriate. In making such orders, the court, in its discretion, may consider relevant court records if the records are available to the public from a clerk of the Superior Court or on the Judicial Branch’s Internet web site. Such orders may include, but are not limited to, an order enjoining the respondent from: (1) Imposing any restraint upon the person or liberty of the applicant; (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking the applicant; and (3) entering the dwelling of the applicant.

“(c) No order of the court shall exceed one year, except that an order may be extended by the court upon proper motion of the applicant, provided a copy of the motion has been served by a proper officer on the respondent, no other order of protection based on the same facts and circumstances is in place and the need for protection, consistent with subsection (a) of this section, still exists. . . .”

<sup>4</sup> General Statutes (Rev. to 2015) § 53a-181d provides in relevant part: “(a) For the purposes of this section, ‘course of conduct’ means two or more acts, including, but not limited to, acts in which a person directly, indirectly or through a third party, by any action, method, device or means, (1) follows, lies in wait for, monitors, observes, surveils, threatens, harasses, communicates with or sends unwanted gifts to, a person, or (2) interferes with a person’s property.

“(b) A person is guilty of stalking in the second degree when:

“(1) Such person knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for such person’s physical safety or the physical safety of a third person; or

“(2) Such person intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person that would cause a reasonable person to fear that such person’s employment, business or career is threatened, where (A) such conduct consists of the actor telephoning to, appearing

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hearing did not support such a finding. Second, the defendant argues that “[n]o evidence was presented by either party that would indicate that [she] would continue to commit the acts she has been accused of.” The defendant asks this court to reverse the court’s judgment and to remand the case to the trial court with direction to deny the plaintiff’s application.

Initially, we observe that the defendant’s appendix does not contain a copy of the trial court’s decision. “It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal.” Practice Book § 61-10 (a); see also Practice Book § 60-5 (“[i]t is the responsibility of the appellant to provide an adequate record for review as provided in [§] 61-10”). The appellant bears the responsibility for providing this court with an appendix that, in part one, “shall contain . . . opinions or decisions of the trial court . . . .” Practice Book § 67-8 (b) (1). For reasons that should be obvious, this noncompliance with the rules of appellate procedure is an impediment to this court’s review of the defendant’s brief as well as the trial court’s decision.

Next, we observe that a copy of the trial court’s decision does not appear in the court file. The court’s rendering of judgment in favor of the plaintiff in this matter constitutes a final judgment. Pursuant to Practice Book § 64-1 (a), the trial court was required “[to] state its decision either orally or in writing . . . . The court’s decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. If oral, the decision shall be recorded by a court reporter, and, if there is an appeal, the trial court

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at or initiating communication or contact at such other person’s place of employment or business, provided the actor was previously and clearly informed to cease such conduct, and (B) such conduct does not consist of constitutionally protected activity. . . .”

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shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed with the clerk of the trial court. . . .” Pursuant to Practice Book § 64-1 (b), “[i]f the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a).” Our review of the court file reflects that the defendant did not attempt to rectify the record by filing a motion pursuant to Practice Book § 64-1 (b) with the appellate clerk. The defendant’s failure leaves this court without a ready means of identifying the trial court’s decision.

The defendant has failed to obtain a memorandum of decision from the court and has failed to include it in the appendix to her brief. The defendant, however, has filed with the appellate clerk a transcript from the court proceeding on January 19, 2016. In challenging the factual and legal basis of the court’s decision, the defendant cites to the transcript and refers to statements made by the court that appear in the transcript.

“When the record does not contain either a memorandum of decision or a transcribed copy of an oral decision signed by the trial court stating the reasons for its decision, this court frequently has declined to review the claims on appeal because the appellant has failed to provide the court with an adequate record for review. . . . Moreover, [t]he requirements of Practice Book § 64-1 are not met simply by filing with the appellate

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clerk a transcript of the entire trial court proceedings. . . . Despite an appellant's failure to satisfy the requirements of . . . § 64-1, this court has, on occasion, reviewed claims of error in light of an unsigned transcript as long as the transcript contains a sufficiently detailed and concise statement of the trial court's findings." (Citations omitted; internal quotation marks omitted.) *Stechel v. Foster*, 125 Conn. App. 441, 445, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011); see also *JP Morgan Chase Bank v. Gianopoulos*, 131 Conn. App. 15, 20–21, 30 A.3d 697 (court may determine that unsigned transcript contains sufficiently detailed and concise statement of trial court's findings), cert. denied, 302 Conn. 947, 30 A.3d 2 (2011).

Our review of the transcript does not reveal a sufficiently detailed and concise statement of the court's findings.<sup>5</sup> "It is well settled that [w]e do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Internal quotation marks omitted.) *State v. Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017). "Our role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the defendant's] claims would be entirely speculative." (Internal quotation marks omitted.) *Stacy B. v. Robert S.*, 165 Conn. App. 374, 382, 140 A.3d 1004 (2016).

On the basis of our careful review of the limited record provided to us by the defendant, we disagree

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<sup>5</sup> In terms of relevant findings, the transcript reflects that the court stated only that the plaintiff "has sustained proof" and that "this is stalking." The court stated that it was "concerned with some of the incidents that . . . have occurred. I believe that the parties have been credible in describing the incidents."

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that the court committed any legal or factual error in reaching the decision that it did. The scant record before us does not reflect the errors claimed by the defendant. See, e.g., *Murcia v. Geyer*, 151 Conn. App. 227, 231, 93 A.3d 1189 (“we are constrained to conclude, on the basis of our review of the limited record provided to us, that the court acted reasonably”), cert. denied, 314 Conn. 917, 100 A.3d 406 (2014); *Lucarelli v. Freedom of Information Commission*, 136 Conn. App. 405, 411, 46 A.3d 937 (“[t]here is nothing in the record before us from which we can conclude that court abused its discretion”), cert. denied, 307 Conn. 907, 53 A.3d 222 (2012).

The judgment is affirmed.

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STATE OF CONNECTICUT *v.* FRANK MCGEE  
(AC 38771)

DiPentima, C. J., and Sheldon and Bishop, Js.

*Syllabus*

The defendant, who had been convicted of, inter alia, two counts of the crime of robbery in the second degree, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. He claimed that his constitutional right against double jeopardy was violated as a result of the imposition of separate sentences on the two counts of robbery in the second degree, each of which was prosecuted in connection with the robbery of a single victim, but under a different subdivision of the statute ([Rev. to 2007] § 53a-135 [a] [1] and [2]) governing robbery in the second degree. *Held* that the defendant’s sentences on two separate counts of robbery in the second degree in connection with a single robbery did not violate his constitutional right against double jeopardy: although the defendant’s conviction of the two counts arose out of the same act or transaction, each robbery offense required proof of a fact that the other did not, as the state, to satisfy the elements of subdivision (1) of § 53a-135 (a), was required to prove that, while committing a robbery, the defendant was aided by another person actually present at the time, whereas, to satisfy the elements of subdivision (2) of § 53a-135 (a), the state had to prove that, in the course of the commission of a robbery, the defendant or another participant in the crime displayed or threatened the use of what he represented by

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his words or conduct to be a deadly weapon, and § 53a-135 contained no language indicating the legislature's intent to bar multiple punishments for perpetrators of robbery in the second degree who, in committing such offenses, violate multiple subdivisions of that statute, the defendant did not direct this court to any evidence of such a legislative intent, and because his claim that the two sentences that were imposed for one incident of robbery in the second degree was a procedurally proper double jeopardy claim over which the trial court had jurisdiction on a motion to correct, the court should have denied, rather than dismissed, the defendant's motion to correct an illegal sentence.

*(One judge dissenting)*

Argued January 19—officially released August 15, 2017

*Procedural History*

Substitute information charging the defendant with two counts of the crime of robbery in the second degree, and with the crimes of larceny in the second degree, conspiracy to commit robbery in the second degree, sexual assault in the third degree, sexual assault in the fourth degree and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Miano, J.*; verdict and judgment of guilty of two counts of robbery in the second degree, and one count each of conspiracy to commit robbery in the second degree, sexual assault in the fourth degree and breach of the peace in the second degree, from which the defendant appealed to this court, which affirmed the judgment of the trial court; thereafter, the Supreme Court denied the defendant's petition for certification to appeal; subsequently, the court, *Fasano, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

*Stephanie L. Evans*, assigned counsel, for the appellant (defendant).

*Ronald G. Weller*, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's

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attorney, and *Cynthia S. Serafini*, senior assistant state's attorney, for the appellee (state).

*Opinion*

SHELDON, J. The defendant, Frank McGee, appeals following the trial court's dismissal of his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly rejected his claim that the imposition of separate sentences upon him on two counts of robbery in the second degree, each prosecuted in connection with the robbery of a single victim, but under a different subdivision of the second degree robbery statute, General Statutes (Rev. to 2007) § 53a-135 (a), violated his constitutional right against double jeopardy. We are not persuaded.

The following factual background and procedural history are relevant to our consideration of the defendant's claim on appeal. The defendant was charged in a seven count substitute information as follows: in count one, with larceny in the second degree in violation of General Statutes § 53a-123 (a) (3); in count two, with robbery in the second degree in violation of § 53a-135 (a) (1); in count three, with robbery in the second degree in violation of § 53a-135 (a) (2); in count four, with conspiracy to commit robbery in the second degree in violation of General Statutes §§ 53a-48 (a) and 53a-135 (a) (2); in count five, with sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (A); in count six, with sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2); and in count seven, with breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (3).<sup>1</sup>

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<sup>1</sup> The information in this case makes it clear that the two robbery offenses with which the defendant was charged were based upon different conduct allegedly undertaken by the defendant. The state charged that the defendant committed robbery while aided by another person actually present, in violation of § 53a-135 (a) (1), and that, during the robbery, he displayed or threatened the use of what he represented by his conduct to be a deadly weapon, in violation of § 53a-135 (a) (2). Thus, each robbery conviction

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Following a jury trial, the defendant was found guilty on both counts of robbery in the second degree and on the separate counts charging him with conspiracy to commit robbery in the second degree, sexual assault in the fourth degree, and breach of the peace in the second degree. He was acquitted on the individual counts charging him with larceny in the second degree and sexual assault in the third degree. Thereafter, on July 8, 2008, the defendant was sentenced as follows: on each count of robbery in the second degree, to a term of ten years of incarceration, to run concurrently with his other sentence for second degree robbery; on the count of conspiracy to commit robbery in the second degree, to a term of ten years of incarceration, to run consecutively to his sentences for second degree robbery; and on the counts of sexual assault in the fourth degree and breach of the peace in the second degree, to terms of one year of incarceration and six months of incarceration, respectively, to run concurrently with his sentence for conspiracy to commit second degree robbery, for a total effective sentence of twenty years of incarceration. The defendant's convictions were affirmed by this court on direct appeal. *State v. McGee*, 124 Conn. App. 261, 4 A.3d 837, cert. denied, 299 Conn. 911, 10 A.3d 529 (2010), cert. denied, 563 U.S. 945, 131 S. Ct. 2114, 179 L. Ed. 2d 908 (2011).

In its opinion on direct appeal, this court summarized the facts underlying the defendant's convictions as follows: "At approximately 1 a.m. on March 23, 2007, the victims, D and T, were on Pine Street in Waterbury, where they purchased a small amount of cocaine from an unidentified individual. Soon thereafter, a silver Lexus, driven by the defendant, pulled up to the victims. When the victims started to drive away in D's car, the defendant continued to follow them closely until D

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related to a specific and separate subdivision of § 53a-135, the statute defining robbery in the second degree.

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pulled over and the victims got out of the car. The defendant began asking D and T if they wanted to ‘get shot.’ The defendant reached into his car, took out a case and told D and T that he had something for them. D and T both testified that they assumed that there was a gun in the black case. The defendant started going through D’s pockets and found \$6, which he took from him. The defendant then searched T for cocaine by placing his hands on different parts of her body. He lifted up her shirt and began touching T’s breasts roughly under her bra, which later caused bruising to that area. D went to his home, two houses away, and called 911. Police officers arrived and found a car matching the description given by D on Congress Avenue. D and T went to Congress Avenue and positively identified the defendant and the other occupants of his car, who were arrested.” (Footnote omitted.) *Id.*, 263–64.

On July 5, 2015, seven years after his sentencing, the defendant, acting on his own behalf, filed a motion to correct an illegal sentence. In his motion, the defendant alleged that “the imposition of sentences for both robbery convictions violates the multiple punishment prohibition of the double jeopardy clause of the fifth amendment to the United States constitution because both convictions [on the two separate (subdivisions) of § 53a-135 (a)] relate to one robbery.”<sup>2</sup> The defendant argued, in his motion to correct, that the two subdivisions of the robbery in the second degree statute under which he was charged and convicted were alternative ways of committing a single criminal offense, and thus

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<sup>2</sup> General Statutes (Rev. to 2007) § 53a-135 (a) provides: “A person is guilty of robbery in the second degree when he commits robbery as defined in section 53a-133 and (1) he is aided by another person actually present; or (2) in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument.”

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that his “right against double jeopardy [was] violated *when he was sentenced* for two counts of robbery in the second degree in this case.”<sup>3</sup> (Emphasis added.)

Subsequently, under the procedure prescribed by *State v. Casiano*, 282 Conn. 614, 627, 922 A.2d 1065 (2007),<sup>4</sup> a public defender appointed by the court conducted a preliminary analysis of the defendant’s double jeopardy claim and concluded, under the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932),<sup>5</sup> that there was a sound

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<sup>3</sup> We note that the defendant did not claim any error associated with his underlying convictions—either in the state’s multiplicitous information charging him with violating two separate subdivisions of the second degree robbery statute or the jury’s guilty verdicts on both subdivisions. He asserts no claim of error as to any of the proceedings at trial that resulted in the jury’s guilty verdicts. Rather, he claimed that, *at sentencing*, the court should have vacated one of those convictions and sentenced him only on the one remaining conviction. See *State v. Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013).

<sup>4</sup> In *Casiano*, our Supreme Court concluded “that a defendant has a right to the appointment of counsel for the purpose of determining whether a defendant who wishes to file [a motion to correct an illegal sentence] has a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion.” *State v. Casiano*, *supra*, 282 Conn. 627–28.

<sup>5</sup> The Supreme Court in *Blockburger* stated that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, *supra*, 284 U.S. 304. Courts utilize the *Blockburger* test to analyze the second part of a two step process to determine whether a defendant’s protection against double jeopardy has been violated. *State v. Alvaro F.*, 291 Conn. 1, 6–7, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009). Our Supreme Court in *Alvaro F.* stated: “In determining whether a defendant has been placed in double jeopardy under the multiple punishments prong, we apply a two step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met. . . . Traditionally, we have applied the [test set out in *Blockburger v. United States*, [supra, 304]] to determine whether two statutes criminalize the same

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basis for that claim, and thus that counsel should be appointed to represent the defendant on his motion to correct. Counsel concluded her analysis as follows: “[B]ecause the defendant was convicted and sentenced [for] two robberies that arose out of the same act, the defendant’s right to be free from double jeopardy was violated when he was convicted and sentenced [for] two counts of robbery. As a result, the court must vacate one of the robbery convictions and sentences.”

After counsel was appointed, the court conducted a hearing on the merits of the defendant’s motion to correct. Thereafter, by memorandum of decision filed October 7, 2015, the trial court dismissed the defendant’s motion on the ground that the defendant’s convictions on two counts of robbery in the second degree did not violate his right against double jeopardy because the defendant’s conduct in committing the robbery in question constituted two separate criminal offenses. In reaching this determination, the court expressly relied on *Blockburger v. United States*, supra, 284 U.S. 299, as applied by this court in *State v. Underwood*, 142 Conn. App. 666, 64 A.3d 1274, cert. denied, 310 Conn. 927, 78 A.3d 146 (2013), in which we determined that imposing separate sentences for attempted robbery in the first degree in connection with a single attempted robbery, based on separate charges brought under different subdivisions of the attempt and first degree robbery statutes, General Statutes §§ 53a-49 and 53a-134, did not violate the defendant’s double jeopardy rights. *Id.*, 683. This appeal followed.

Practice Book § 43-22 provides that “[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition

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offense . . . .” (Citations omitted; internal quotation marks omitted.) *State v. Alvaro F.*, supra, 6-7.

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made in an illegal manner.” Our Supreme Court has stated that an “illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant’s right against double jeopardy, is ambiguous, or is internally contradictory.” (Internal quotation marks omitted.) *State v. Lawrence*, 281 Conn. 147, 156, 913 A.2d 428 (2007).<sup>6</sup>

<sup>6</sup> Our dissenting colleague suggests, in an analysis he first proposed at oral argument on this appeal, that the trial court lacked subject matter jurisdiction over the defendant’s motion to correct because the claim therein presented constituted an unlawful collateral attack on his second robbery conviction rather than a lawful double jeopardy challenge to the sentence imposed on that conviction. When the state and the defense were given the opportunity to brief this jurisdictional issue after oral argument, they disagreed with our colleague’s analysis, concluding in simultaneous supplemental briefs that the defendant’s motion to correct, regardless of its substantive merits, raised a procedurally proper double jeopardy challenge to his multiple sentences for robbery in the second degree rather than an improper collateral attack on one of his second degree robbery convictions. For the following reasons, we agree with the parties that the trial court had jurisdiction over the defendant’s motion to correct.

In support of his analysis, our colleague relies heavily on two decisions from this court, neither of which involved a double jeopardy claim that was based upon the imposition of two sentences for one criminal act. Both cases, instead, involve claims mislabeled as double jeopardy claims, which actually challenged the legality of the guilty verdicts upon which sentences were imposed and judgments of conviction were rendered rather than multiple sentences imposed upon lawful verdicts that were based upon conduct claimed to constitute a single criminal offense. In *State v. Wright*, 107 Conn. App. 152, 944 A.2d 991, cert. denied, 289 Conn. 933, 958 A.2d 1247 (2008), for example, the defendant claimed that the sentence imposed upon him as an accessory to murder was illegal because he was never charged as an accessory. That claim, though styled a double jeopardy claim, was actually based upon the defendant’s contention that he could not be found guilty of a crime with which he had not properly been charged. As this court held, “the defendant’s claim, by its very nature, presupposes an invalid conviction.” *Id.*, 157. The court in *Wright* thus concluded that the defendant’s motion to correct his sentence constituted an improper collateral attack on his conviction.

Similarly, in *State v. Starks*, 121 Conn. App. 581, 997 A.2d 546 (2010), upon which the dissent also relies, this court concluded that, in challenging the legality of his sentence, the defendant was actually “attacking the validity of his conviction by challenging the sufficiency of the evidence with regard to [his conviction].” *Id.*, 590. On that basis, the court in *Starks* court, like the court in *Wright*, concluded that the defendant’s motion to correct constituted an improper collateral attack on his conviction.

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“Ordinarily, a claim that the trial court improperly denied a defendant’s motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In the present case, however, the defendant’s claim presents a question of statutory interpretation over which our review is plenary.” (Citations omitted.) *State v. Tabone*, 279 Conn. 527, 534, 902 A.2d 1058 (2006). “In undertaking this interpretation, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.” (Internal quotation marks omitted.) *Santorso v. Bristol Hospital*, 308 Conn. 338, 355–56, 63 A.3d 940 (2013).

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Both *Wright* and *Starks* are thus readily distinguishable from the instant case because they both involved challenges to the proceedings that underlay their guilty verdicts. The defendant in *Wright* challenged the adequacy of the state’s information upon which his judgment of conviction was based, and the defendant in *Starks* challenged the sufficiency of the evidence upon which his conviction was based.

Here, by contrast, the defendant has not challenged, in any way, the validity of his convictions for robbery in the second degree or of the guilty verdicts upon which they rest. He has not claimed any infirmity with the state’s information; he has not advanced any claims of insufficiency with respect to the state’s evidence against him, or of evidentiary error, instructional error, prosecutorial impropriety, or any other type of error upon which the legality of trial proceedings or of the verdicts and judgments they result in are routinely challenged. Rather, he claimed that, at sentencing, the court should have vacated one of his two second degree robbery convictions and sentenced him only on one of those convictions. See *State v. Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013).

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“Double jeopardy attaches where multiple punishments are imposed for the same offense in a single trial. . . . The question to be resolved is whether the two offenses charged are actually one.” (Internal quotation marks omitted.) *State v. Santiago*, 145 Conn. App. 374, 380–81, 74 A.3d 571, cert. denied, 310 Conn. 942, 79 A.3d 893 (2013). “Traditionally we have applied the [test set out in *Blockburger v. United States*, supra, 284 U.S. 304] to determine whether two statutes criminalize the same offense. . . . Under that test, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial. . . . Thus, [t]he issue, though essentially constitutional, becomes one of statutory construction.” (Citations omitted; internal quotation marks omitted.) *State v. Alvaro F.*, 291 Conn. 1, 7, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009).

“Our analysis of [the defendant’s] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest. . . . When the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary.” (Citations omitted; internal quotation marks omitted.) *Id.*, 12–13.

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In this case, the state agrees that the first prong of *Blockburger* is satisfied because the defendant's conviction of two counts of robbery in the second degree arose out of the same act or transaction, the robbery of D. The state claims, however, that the defendant's claim fails under the second prong of *Blockburger* because each robbery offense charged in the information, of which the defendant was convicted, requires proof of a fact the other does not. We agree.<sup>7</sup>

In considering the defendant's double jeopardy challenge, we are guided by *State v. Underwood*, supra, 142 Conn. App. 666, wherein this court rejected the defendant's claim that two convictions for attempt to commit robbery in the first degree, arising out of a single act or transaction against a single victim, under two subdivisions of General Statutes § 53a-134 (a), the first degree robbery statute, violated his right against double jeopardy. The court reasoned: "To convict the defendant of attempt to commit robbery in the first degree under §§ 53a-49 (a) (2) and 53a-134 (a) (1), the state was required to prove, as alleged in count three

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<sup>7</sup> We agree with the dissent that a motion to correct an illegal sentence on grounds of double jeopardy must claim error in the imposition of multiple sentences for a single criminal offense, not error in the trial proceedings leading up to the guilty verdicts upon which those sentences were imposed. There are times, however, when a challenged sentence is so intertwined with a conviction resulting from imposition of that sentence that the vacation of the sentence requires the vacation of the judgment of conviction as well. That occurs, for example, where a defendant is found guilty on more than one count of a multicount information, each of which charges him with the same criminal offense, based upon the same act or course of conduct, but under a discrete and different theory of liability. There is, of course, nothing wrong with charging a defendant with a single criminal offense in multiple counts, each based upon a discrete and different theory of liability, nor is there anything wrong with taking a separate guilty verdict on each such count. An error arises, however, when separate sentences are imposed on the defendant on two or more of those separate verdicts, for such multiple sentences constitute multiple punishments for a single criminal offense. That is precisely the circumstance that gave rise to the defendant's procedurally proper motion to correct in this case.

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of the information, that the defendant possessed the requisite mental state and took a substantial step toward committing first degree robbery, and that he or another, during the attempted robbery or flight therefrom, '[c]ause[d] serious physical injury' to a nonparticipant in the crime. To convict the defendant of attempt to commit robbery in the first degree under §§ 53a-49 (a) (2) and 53a-134 (a) (2), the state was required to prove, as alleged in count one of the information, that the defendant possessed the requisite mental state and took a substantial step toward committing first degree robbery, and that he or another, during the attempted robbery or flight therefrom, was 'armed with a deadly weapon . . . .' Count three did not require the defendant to use a deadly weapon to cause serious physical injury, and count one did not require that serious physical injury was caused by the defendant being armed with a deadly weapon. Because each of the charged offenses requires proof of an element the other does not, the charges against and subsequent conviction of the defendant of two counts of attempted first degree robbery did not violate the defendant's right not to be placed twice in jeopardy for the same offense pursuant to the *Blockburger* test." Id., 683–84.

Similarly, it is clear from the plain language of the relevant portions of § 53a-135 (a) (1) and (2), as charged in this case, that each offense requires proof of a fact which the other does not. To satisfy the elements of § 53a-135 (a) (1), the state was required to prove that, while committing a robbery in violation of General Statutes § 53a-133, the defendant was aided by another person actually present at the time. To convict the defendant under § 53a-135 (a) (2), by contrast, the state was required to prove that, in the course of commission of a robbery in violation of § 53a-133, he or another participant in the crime displayed or threatened the use of what he represented by his words or conduct to

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be a deadly weapon. Because each of these statutory subdivisions requires proof of different facts—subsection (a) (1) requiring proof that the defendant was aided by another person actually present, but not that he or another participant displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon, and subsection (a) (2) requiring proof that the defendant or another participant in the robbery displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon, but not that he was aided by another person actually present—they are two separate offenses. Moreover, § 53a-135 contains no language indicating the legislature’s intent to bar multiple punishments for the perpetrators of single second degree robberies who, in committing such offenses, violate multiple subdivisions of the second degree robbery statute, and the defendant has failed to direct this court to any evidence of such a legislative intent.

On the basis of the foregoing, we conclude that the defendant was properly sentenced on two separate counts of robbery in the second degree in connection with the robbery he committed on March 23, 2007, without violating his constitutional right against double jeopardy. Because, however, the defendant’s claim that the two sentences were imposed upon him for one second degree robbery was a procedurally proper double jeopardy claim over which the court had jurisdiction on a motion to correct, the court should have denied, rather than dismissed, his motion to correct. See *State v. Santiago*, *supra*, 145 Conn. App. 379–80.

The form of judgment is improper, the judgment of dismissal is reversed and the case is remanded with direction to deny the defendant’s motion to correct an illegal sentence.

In this opinion DiPENTIMA, C. J., concurred.

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BISHOP, J., dissenting. Finding that the trial court had jurisdiction to hear the motion to correct an illegal sentence filed by the defendant, Frank McGee, my colleagues in the majority analyze the defendant's claim on the merits and, finding none, reverse the court's dismissal and remand the case to the trial court with direction to deny the motion. Unlike my colleagues, I do not believe that the trial court had jurisdiction to hear this motion, as I view it as no more than a collateral attack on the defendant's conviction.<sup>1</sup> Therefore, I would affirm the dismissal of the motion, albeit not for the reasons stated by the trial court.

This case began with the July 5, 2015 filing of a motion to correct an illegal sentence by the (then) self-represented defendant. In that motion, the defendant claimed that his sentences for two counts of robbery in the second degree were illegal because they constituted two punishments for the commission of one offense. Nowhere in his motion did he make any argument that his sentences, themselves, violated double jeopardy

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<sup>1</sup> The majority asserts that "the defendant did not claim any error associated with his underlying convictions . . . ." This assertion is contradicted by the record. Indeed, in the concluding paragraph of the defendant's opening brief, he states: "For the same reasons articulated by our court and the Supreme Court, the defendant's conviction for two counts of robbery, second, violates the double jeopardy clause by receiving multiple punishments for the same crime. . . . As a result, the defendant respectfully requests that this court find that the trial court erred, that the robbery, second, statute simply provides alternate ways in which to commit the same crime and that his conviction and sentence violate the protections of the double jeopardy clause."

Additionally, it is noteworthy that the defendant's argument focuses entirely on whether his convictions for two counts of robbery in the second degree violated the prohibition against double jeopardy. Nowhere does he make a claim that his concurrent sentences or the sentencing proceedings, themselves, violated his double jeopardy rights. Rather, he attacks the trial proceedings. As a consequence, in order to review the defendant's claim, on the merits, the trial court and the majority on appeal were required to examine the trial record and preconviction proceedings, an examination beyond the scope of the court hearing a motion to correct an illegal sentence.

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except for his argument that they flowed from convictions that he claimed violated his right not to be convicted twice for one offense.

Also, it is notable that nowhere in his motion or any of the supporting documents that he filed, either personally or through counsel, did the defendant specify the relief he sought except by the caption of his motion to “correct an illegal sentence.” After being appointed, pursuant to *State v. Casiano*, 282 Conn. 614, 627–28, 922 A.2d 1065 (2007), to review the defendant’s petition, counsel filed a report in which she indicated her belief that there was a sound basis to the motion. Counsel’s analysis consisted entirely of a discussion of whether the offenses of which the defendant was convicted were, in fact, the same offense for double jeopardy purposes. From her analysis, counsel concluded that the two counts of robbery constituted only one offense and, therefore, the defendant’s double jeopardy rights were violated when he was convicted and sentenced on both counts. In reaching this conclusion, counsel asserted no claim that the sentences, themselves, violated double jeopardy apart from the fact that they flowed from flawed convictions. On the basis of her assessment, counsel concluded: “As a result, the court must vacate one of the robbery convictions and sentences.”<sup>2</sup>

With respect to the relief the defendant seeks, his brief provides no more illumination than his motion or counsel’s sound basis analysis. While the defendant repeats his claim that his double jeopardy rights were

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<sup>2</sup> Interestingly, counsel did not suggest, in this sound basis analysis, which of the convictions should be vacated. Presumably the court could, if it found jurisdiction and merit to the defendant’s quest, simply pick one of the convictions at random and its attendant sentence, leaving the other in place, an outcome beyond the court’s authority and, in my view, a legally absurd proposition.

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violated when he was sentenced for two counts of robbery in the second degree, his entire analysis focuses on whether his underlying conduct constituted two offenses, as charged and found by the jury, or simply two alternative ways of committing the same offense. In the concluding portion of his brief, the defendant states: “For the same reasons articulated by [the Appellate Court] and the Supreme Court, the defendant’s conviction for two counts of robbery, second, violates the double jeopardy clause by receiving multiple punishments for the same crime.”<sup>3</sup>

I first turn to the general principles that guide my analysis of the court’s lack of jurisdiction to hear the defendant’s motion. At common law, once a court renders a judgment of conviction and sentences a defendant, the court loses jurisdiction over the defendant and the sentence, unless the court expressly has been authorized to act. *State v. Lawrence*, 281 Conn. 147, 154, 913 A.2d 428 (2007). We know, as well, that there

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<sup>3</sup> In characterizing the sentencing as the trigger for a double jeopardy claim, counsel conflated sentencing with conviction and, doing so, ignored the basic law that if the defendant was, in fact, twice convicted for one offense, the convictions themselves constitute punishment in violation of the protection against double jeopardy. Thus, apart from any sentencing issue, the defendant could have directly appealed from his convictions on the basis of double jeopardy. See *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996); *State v. Cator*, 256 Conn. 785, 781 A.2d 285 (2001). He now apparently seeks, through collateral attack, to do that which he did not do on direct appeal. In doing so, counsel for the defendant acknowledged her belief that she now is required to file a motion to correct an illegal sentence as a precondition to later filing a habeas petition attacking the conviction on ineffectiveness grounds. See *Cobham v. Commissioner of Correction*, 258 Conn. 30, 39, 779 A.2d 80 (2001) (“[w]e . . . conclude that, in order to challenge an illegal sentence, a defendant either must appeal the sentence directly or file a motion to correct the sentence pursuant to [Practice Book] § 43-22 with the trial court before raising a challenge for the first time in a petition for a writ of habeas corpus”). Query whether the rule of *Cobham* applies to require a defendant to file a motion nominally attacking a sentence as illegal but which is, in fact, only a collateral attack on one’s convictions.

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is no legislative or constitutional grant of continuing jurisdiction to give the trial court power to correct a sentence. *Id.* Finally, we know that there is, however, a common-law exception to this rule, which permits a court, at any time, to correct an illegal sentence. *Id.*, 154–55. Practice Book § 43-22 is the embodiment of that common-law exception. It provides: “The judicial authority may at any time correct an illegal sentence or other illegal disposition or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.”<sup>4</sup> Practice Book § 43-22.

It is axiomatic in Connecticut jurisprudence that “Practice Book rules do not ordinarily define subject

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<sup>4</sup> Practice Book § 43-22 has an interesting pedigree. The rule’s predecessor, Practice Book (1982) § 935, had provided: “The judicial authority who sentenced the defendant may, within ninety days, correct an illegal sentence or other illegal disposition, or he may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner.” In December, 1982, on the recommendation of then Superior Court Judge Frank Kinney, the rules committee of the Superior Court amended the rule to its present form. The transmittal regarding Judge Kinney’s recommendation stated: “Judge Kinney suggests that we adopt a rule permitting the correction of an illegal sentence at any time instead of the 90 day limitation.” Memorandum to Carl Testo from Frank Buonocore (December 15, 1982) (copy contained in the file of this case in the Appellate Court clerk’s office).

The transmittal also makes reference to our Supreme Court’s opinion in *State v. Pina*, 185 Conn. 473, 477–78, 440 A.2d 962 (1981), in which the trial court had sentenced the defendant to periods of incarceration for the commission of two crimes, but did not specify whether the terms were to run consecutively or concurrently. Discovering this omission, the state moved to correct the illegal sentence more than ninety days after its imposition. *Id.*, 482 n.7. After the trial court responded by specifying that the sentences were to be served consecutively, the defendant appealed on the basis of double jeopardy. *Id.*, 477–78. Our Supreme Court rejected the defendant’s double jeopardy argument on the ground that the constitutional protections against double jeopardy are not as rigorous regarding sentencing as they are regarding convictions. The court set aside the judgment, nevertheless, on the ground that because the state’s motion had been filed more than ninety days after the date of sentencing, the trial court was without power to act. *Id.*, 482. From this chain of events, all we can conclude is that the time limit for filing a motion to correct an illegal sentence was removed from the rule of practice in 1982.

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matter jurisdiction. General Statutes § 51-14 (a) authorizes the judges of the Superior Court to promulgate rules regulating pleading, practice and procedure in judicial proceedings . . . . Such rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts.” (Internal quotation marks omitted.) *State v. Lawrence*, supra, 281 Conn. 155. Thus, “[b]ecause the judiciary cannot confer jurisdiction on itself through its own rule-making power, [Practice Book] § 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution has begun. . . . Therefore, for the trial court to have jurisdiction to consider the defendant’s claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review.” (Citation omitted.) *Id.*

Our decisional law teaches that there are four categories of claims cognizable under Practice Book § 43-22. “[A]n illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant’s right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable.” (Citations omitted; internal quotation marks omitted.) *Id.*, 156–57.<sup>5</sup>

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<sup>5</sup> As noted, an illegal sentence includes a sentence that violates a defendant’s right to protection from double jeopardy. In my view, the reference to double jeopardy is tied to the sentence and not to the underlying conviction. If not, then the jurisprudence stating that a Practice Book § 43-22

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motion presumes a valid conviction has no meaning. The majority's view that one may legitimately utilize this rule of practice as a vehicle to attack multiple convictions as violating the protection against double jeopardy represents an unwarranted expansion of the scope of this rule beyond its common-law basis. As noted by several cases cited herein, the focus of the court when confronted with a § 43-22 motion must be on the sentencing and not on the underlying conviction. The majority appears to have the view that double jeopardy claims are in a separate category and that a defendant may utilize § 43-22 to attack both convictions and sentencings which are claimed to violate double jeopardy protections. While I agree that the *State v. Cator*, supra, 256 Conn. 785, *State v. Chicano*, 216 Conn. 699, 584 A.2d 425 (1990), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), overruled in part by *State v. Polanco*, 308 Conn. 242, 248, 261, 61 A.3d 1084 (2013), and the *State v. Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), line of cases appear to suggest that a court, pursuant to § 43-22, may vacate a conviction, I cannot harmonize those cases with our Supreme Court's view of § 43-22, as expressed in *State v. Francis*, 322 Conn. 247, 140 A.3d 927 (2016), and *State v. Lawrence*, supra, 281 Conn. 147.

In my view, Practice Book § 43-22, to be true to its origins, is available only to correct an illegal sentence. And, indeed, our jurisprudence reflects a range of sentencing-only double jeopardy claims that fall within the ambit of § 43-22.

For example, in *State v. Tabone*, 279 Conn. 527, 902 A.2d 1058 (2006), the defendant argued that his sentence was illegal under two separate grounds: 1. the sentence exceeded the maximum statutory punishment; and 2. the sentence violated double jeopardy. In his second claim, the defendant argued in the trial court and on appeal that his sentence violated his protection against double jeopardy because it "constitutes cumulative multiple punishments exceeding what the legislature intended . . . ." (Internal quotation marks omitted.) Id., 532. In deciding the defendant's first claim, our Supreme Court held that a sentence of ten years of imprisonment and ten years of special parole exceeds the maximum statutory limit for the offense of sexual assault in the second degree. Id., 533. Although the court did not reach the defendant's double jeopardy claim; id., 544 n.7; the case is an apt demonstration of a colorable double jeopardy claim as it relates only to sentencing.

Similarly, in *State v. Baker*, 168 Conn. App. 19, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016), the defendant asserted a colorable, although unsuccessful, double jeopardy claim focused solely on punishment when he asserted that the sentence he received upon being convicted for the possession of a weapon or dangerous instrument in a correctional facility amounted to a double punishment in light of the administrative punishment he had received from the Department of Correction for the same behavior.

Additionally, in *Steve v. Commissioner of Correction*, 39 Conn. App. 455, 665 A.2d 168, cert. denied, 235 Conn. 929, 667 A.2d 555 (1995), this court followed federal precedent in holding that "time served on [a] vacated sentence must be treated and credited as postconviction confinement. To fail to do so would be a violation of the fifth amendment guarantee against double jeopardy." Id., 463. In so holding, we followed the United States Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part by *Alabama v. Smith*, 490 U.S. 794, 798-99, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), which addressed a sentencing-only double jeopardy claim. There, the defendant was convicted of assault with the intent to commit rape, a conviction that

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was later reversed, and, upon retrial, the defendant was convicted and resentenced. At the time of his resentencing, the defendant had already served six and one-half years of incarceration on his original conviction, onto which the court added the new sentence. The defendant argued that this violated his protection against double jeopardy and the Supreme Court agreed, holding that “the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.” (Footnote omitted; internal quotation marks omitted.) *Id.*, 718–19.

A number of state court decisions, in addition to *Steve*, have followed the *Pearce* reasoning in the resentencing context. For example, in *State v. Tapparra*, 82 Haw. App. 83, 919 P.2d 995 (1996), the Intermediate Court of Appeals of Hawaii, applying *Pearce*, held that the defendant, upon resentencing, must be credited for the days he had already served in prison, the portion of the fine he had already paid, and the community service hours he had already served. *Id.*, 89.

In *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L. Ed. 872 (1873), the United States Supreme Court addressed another type of sentencing-only double jeopardy claim. There, a defendant was convicted of stealing federal mail bags, a crime which carried a punishment of *either* imprisonment *or* a fine. The defendant, however, was sentenced to *both* imprisonment *and* a fine. The United States Supreme Court held that subjecting the defendant to both punishments violated double jeopardy. *Id.*, 176. The *Ex parte Lange* holding sparked over a century’s worth of cases nationwide, which highlight the fact that a defendant very well may bring a double jeopardy claim challenging only his sentence, independent from his conviction. For instance, in *United States v. Versaglio*, 85 F.3d 943 (2d Cir.), modified after reh. on other grounds, 96 F.3d 637 (2d Cir. 1996), the defendant was convicted of criminal contempt and sentenced, like the defendant in *Ex parte Lange*, to pay a fine *and* to a term of imprisonment. He argued that, statutorily, he could only be sentenced to one or the other and, since he had already paid his fine, the prison sentence should be vacated. *Id.*, 945. The United States Court of Appeals for the Second Circuit Court, relying on *Ex parte Lange* and its progeny, agreed with the defendant and stated “the rule of *Lange* . . . [precludes] imposition of the alternative punishment of imprisonment.” *Id.*, 948.

The Nevada Supreme Court reaffirmed its commitment to the *Ex parte Lange* line of reasoning in 2007 in *Wilson v. State*, 123 Nev. 587, 594, 170 P.3d 975 (2007). There, the defendant was convicted of four counts of production of child pornography and four counts of possession of child pornography. On direct appeal, the court reversed three of the four production convictions as violative of double jeopardy and remanded the case for resentencing. Thereafter, the defendant was resentenced and the court increased his sentences for the possession convictions, and changed the sentences from running concurrently to running consecutively. The Nevada Supreme Court held that the court’s “resentencing on the lawful portions of [the defendant’s] conviction surviving direct appeal violated [the defendant’s] rights against double jeopardy.” *Id.*, 597.

Courts have also addressed claims in which defendants argue that their double jeopardy rights had been violated by courts adding requirements to

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From my review of decisional law on this topic, it is apparent that confusion abounds on the question of the jurisdiction of the trial court to hear a motion to correct an illegal sentence. On one hand, there is a stream of cases which hold that the focus of a motion to correct an illegal sentence must be on the sentencing procedure and not on the trial proceedings. But, there is also a countercurrent of cases which appear to suggest that a motion to correct an illegal sentence may properly be utilized to correct dual convictions for single offenses. The disarray is palpable from the number of reversals by this court on the basis of our determination, on review, that the trial court either incorrectly determined it had no jurisdiction when it did, or it exercised jurisdiction when it was lacking.<sup>6</sup> My colleagues in the

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their sentence after they were released from custody or probation. See *State v. Schubert*, 212 N.J. 295, 53 A.3d 1210 (2012), wherein the New Jersey Supreme Court held that the trial court's action in amending its judgment to add a requirement of community supervision for life after the defendant had been discharged from probation violated the defendant's double jeopardy rights. *Id.*, 316; see also *People v. Williams*, 14 N.Y.3d 198, 925 N.E.2d 878, 899 N.Y.S.2d 76, cert. denied, 562 U.S. 947, 131 S. Ct. 125, 178 L. Ed. 2d 242 (2010), wherein the New York Court of Appeals held that defendants who had been released from prison before resentencing proceedings were commenced had a legitimate expectation of finality of their originally imposed sentences and, thus, to impose previously omitted terms of postrelease supervision at resentencing violated their double jeopardy rights. *Id.*, 217.

<sup>6</sup> In the following cases, this court, on review, reversed the trial court either for deciding a matter on the merits when we determined it did not have the jurisdiction to do so, or we reversed the trial court for having dismissed a motion for want of jurisdiction where we determined that the court, in fact, had jurisdiction: *State v. McClean*, 173 Conn. App. 62, A.3d (2017) (trial court dismissed motion to correct illegal sentence for lack of jurisdiction, on appeal, court determined there was jurisdiction; on remand from our Supreme Court, this court affirmed original dismissal for lack of jurisdiction); *State v. Williams-Bey*, 173 Conn. App. 64, A.3d (trial court dismissed motion to correct illegal sentence for lack of jurisdiction, on appeal, court determined there was jurisdiction; on remand from our Supreme Court, this court affirmed original dismissal for lack of jurisdiction), cert. granted on other grounds, 326 Conn. 920, A.3d (2017); *State v. Abraham*, 152 Conn. App. 709, 99 A.3d 1258 (2014) (trial court incorrectly dismissed motion to correct for lack of jurisdiction); *State v. Meikle*, 146 Conn. App. 660, 79 A.3d 129 (2013) (trial court incorrectly exercised jurisdiction in denying motion to correct); *State v. St. Louis*, 146 Conn. App. 461, 76 A.3d 753 (trial court incorrectly exercised jurisdiction in denying motion to correct), cert. denied, 310 Conn. 961, 82 A.3d 628

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majority have not righted the ship. Thus, our course in this jurisprudence remains aimless, lending confusion and uncertainty to litigants and the trial bench as well. It is high time to find the proper course.

We and our Supreme Court, have opined that a motion to correct an illegal sentence must focus on the sentencing proceedings, and may not be used as a collateral attack on one's conviction. In *State v. Mollo*, 63 Conn. App. 487, 776 A.2d 1176, cert. denied, 257 Conn. 904, 777 A.2d 194 (2001), we affirmed the trial court's decision holding that Practice Book § 43-22 does not authorize the trial court to vacate a conviction. In *Mollo*, we concluded: "The defendant does not claim that the court imposed the sentence in an illegal manner but, rather, that the concept of illegal sentence under Practice Book § 43-22 includes any sentence based on a voidable conviction. We do not agree." (Internal quotation marks omitted.) *Id.*, 491. In *State v. Koslik*, 116 Conn. App. 693, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009), we expressly followed *Mollo* and observed: "Our Supreme Court has concluded that to invoke successfully the court's jurisdiction with respect to a claim of an illegal sentence, the focus cannot be on what occurred during the underlying conviction. . . . In order for the court to have jurisdiction

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(2013); *State v. Santiago*, 145 Conn. App. 374, 74 A.3d 571 (trial court incorrectly dismissed motion for lack of jurisdiction), cert. denied, 310 Conn. 942, 79 A.3d 893 (2013); *State v. Clark*, 136 Conn. App. 421, 47 A.3d 391 (trial court incorrectly exercised jurisdiction in denying motion to correct), cert. denied, 307 Conn. 906, 53 A.3d 221 (2012); *State v. Henderson*, 130 Conn. App. 435, 24 A.3d 35 (2011) (trial court incorrectly dismissed motion for lack of jurisdiction), appeals dismissed, 308 Conn. 702, 66 A.3d 847 (2013); *State v. Osuch*, 124 Conn. App. 572, 5 A.3d 976 (trial court incorrectly dismissed motion for lack of jurisdiction), cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010); *State v. Starks*, 121 Conn. App. 581, 997 A.2d 546 (2010) (trial court incorrectly exercised jurisdiction in denying portion of motion to correct); *State v. Delgado*, 116 Conn. App. 434, 975 A.2d 736 (2009) (trial court incorrectly exercised jurisdiction in denying motion to correct); *State v. Taylor*, 91 Conn. App. 788, 882 A.2d 682 (trial court incorrectly exercised jurisdiction in denying motion to correct), cert. denied, 276 Conn. 928, 889 A.2d 819 (2005); *State v. Francis*, 69 Conn. App. 378, 793 A.2d 1224 (trial court incorrectly exercised jurisdiction in denying motion to correct), cert.

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over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack.” (Citations omitted; internal quotation marks omitted.) *Id.*, 699.

Later, in *State v. Smith*, 150 Conn. App. 623, 92 A.3d 975, cert. denied, 314 Conn. 904, 99 A.3d 1169 (2014), we reaffirmed our view of the narrow scope of Practice Book § 43-22 in our statement that: “The purpose of . . . [Practice Book] § 43-22 is not to attack the validity of a conviction by setting it aside but, rather to correct an illegal sentence or disposition, or one imposed or made in an illegal manner.” (Internal quotation marks omitted.) *Id.*, 635; accord *State v. Starks*, 121 Conn. App. 581, 591–92, 997 A.2d 546 (2010). The same point was made, again, in a slightly different manner in *State v. Saunders*, 132 Conn. App. 268, 270, 50 A.3d 321 (2011), cert. denied, 303 Conn. 924, 34 A.3d 394 (2012); accord *State v. Parker*, 295 Conn. 825, 835, 992 A.2d 1103 (2010). In *State v. Saunders*, *supra*, 132 Conn. App. 271, we restated language found in *Mollo* that “the relief allowed by . . . [Practice Book] § 43-22 . . . require[s], as a precondition, a valid conviction.” (Internal quotation marks omitted.)

We have held, as well, that the fact that the defendant frames his motion as an attack on his sentence, if, in reality, his focus is on his underlying conviction, the court will not have jurisdiction pursuant to Practice Book § 43-22. *State v. Wright*, 107 Conn. App. 152, 944 A.2d 991, cert. denied, 289 Conn. 933, 958 A.2d 1247 (2008). In *Wright*, a case with significant parallels to the case at hand, a panel of this court found that the trial court had no jurisdiction even though the defendant assailed his sentence as a violation of his protection

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denied, 260 Conn. 935, 802 A.2d 88, cert. denied, 537 U.S. 1056, 123 S. Ct. 630, 154 L. Ed. 2d 536 (2002).

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against double jeopardy. *Id.*, 157–58. There, the defendant filed a motion to correct an illegal sentence approximately three and one-half years after his sentencing, in which he claimed that his sentence violated his constitutional protection against double jeopardy. *Id.*, 154–56. A panel of this court agreed with the trial court’s dismissal on jurisdictional grounds. In its opinion, the panel observed: “The defendant claims that the court had jurisdiction to correct his sentence because it violated his constitutional protection against double jeopardy. Specifically, he argues that he could not be convicted as an accessory to murder because the information did not include an accessorial liability charge. He claims that the polling of the jurors demonstrated that he was ‘acquitted’ as being the principal in the crime. For that reason, he argues that the sentence imposed for his conviction as an accessory to murder violates the prohibition against double jeopardy.” (Footnote omitted.) *Id.*, 155. In concluding that the trial court had correctly determined it had no jurisdiction, the panel in *Wright* observed: “In the present case, the defendant’s claim, by its very nature, presupposes an invalid conviction. The defendant does not claim that the sentence he received exceeded the maximum statutory limits prescribed for the crime for which he was convicted. He also does not claim that he was denied due process at his sentencing hearing or that his sentence is ambiguous or internally contradictory. If the defendant’s claim were to fall into any of those categories, Practice Book § 43-22 would be the proper vehicle by which he could invoke the trial court’s jurisdiction. Because the defendant’s claim falls outside that set of narrow circumstances in which the court retains jurisdiction over a defendant once that defendant has been transferred into the custody of the commissioner of correction to begin serving his sentence, the court lacks jurisdiction to consider the claim pursuant to a

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motion to correct an illegal sentence under Practice Book § 43-22. . . .

“We conclude that the defendant’s claim that his sentence is illegal because it violates his constitutional protection against double jeopardy is actually a claim of an improper conviction, which is, in reality, a collateral attack on his conviction and does not fall within the purview of Practice Book § 43-22.” (Citation omitted; footnote omitted.) *Id.*, 157.

In *State v. Starks*, *supra*, 121 Conn. App. 590, this court expressly followed *Wright* in holding that, notwithstanding a defendant’s nominal attack on his sentence, where his claim is, in reality, an attack on his conviction, the court lacks jurisdiction under Practice Book § 43-22 to hear the motion. There, we stated: “Our Supreme Court has concluded that to invoke successfully the court’s jurisdiction with respect to a claim of an illegal sentence, the focus cannot be on what occurred during the underlying conviction. . . . In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack.” (Internal quotation marks omitted.) *Id.* The court in *Starks* concluded: “Insofar as this portion of the defendant’s motion to correct constituted a collateral attack on his conviction and, thus, was outside of the court’s jurisdiction, the court should have dismissed, rather than denied, this portion of the motion. See, e.g., *State v. Wright*, [*supra*, 107 Conn. App. 157–58].” *State v. Starks*, *supra*, 590.

Notwithstanding *Wright*, our subsequent express adherence to it, and the several cases in which we have held that a Practice Book § 43-22 motion may not be utilized as a vehicle to attack one’s conviction, we appear to have sanctioned just that approach in *State*

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v. *Santiago*, 145 Conn. App. 374, 74 A.3d 571, cert. denied, 310 Conn. 942, 79 A.3d 893 (2013), a case which I am unable to distinguish from *Wright*. Both *Wright* and *Santiago* involve defendants who filed motions to correct illegal sentences on the basis of double jeopardy, but resulted in different outcomes on appeal. In *Wright*, the trial court dismissed the defendant's motion as a collateral attack on his conviction, over which the court had no continuing jurisdiction. We affirmed the court's determination on appeal. *State v. Wright*, supra, 107 Conn. App. 158. In *Santiago*, the trial court also dismissed the defendant's motion for lack of jurisdiction, but on appeal, we reversed, ordering instead that the court deny the motion on the basis that the defendant had made a double jeopardy claim even though it, too, attacked his conviction. *State v. Santiago*, supra, 384. From my perspective *Wright* and *Santiago* cannot be harmonized.

To be sure, the defendant in *Santiago*, unlike the defendant in the case at hand who received concurrent sentences, alleged that the imposition of consecutive sentences on the two charges of which he was convicted, which arose out of the same incident, violated his rights against double jeopardy. *Id.*, 377. In *Santiago*, we determined that the trial court did have jurisdiction over a motion to correct an illegal sentence because he had founded his claim on an allegation of double jeopardy, language which we apparently then thought adequate to confer jurisdiction. *Id.*, 379–80. Having further reviewed the underpinnings to *Santiago*, I have concluded that it is inconsistent with our prior jurisprudence that a motion to correct an illegal sentence may not be used as a vehicle to attack one's conviction even if framed as an illegal sentence claim. Thus, I have concluded, with respect, that our decision in *Santiago* was incorrect and should not be followed.<sup>7</sup>

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<sup>7</sup> I am aware, of course, of the stated policy of this court that one panel will not overturn the decision of a prior panel. See *Consiglio v. Trans-*

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I believe that the holding in *Wright* is applicable to the case at hand. In opining that a motion to correct an illegal sentence may not be used as a vehicle to collaterally attack a sentence, the court in *Wright* stood on solid ground and within the parameters of its common law antecedents.

That said, *Santiago* does not represent the only cross-current to the view that a court, pursuant to a motion to correct an illegal sentence, may not affect a conviction. Rather, it finds some support in a few decisions in which Practice Book § 43-22 appears to have been legitimized as a vehicle to alter a conviction and not merely a sentence. In *State v. Cator*, 256 Conn. 785, 781 A.2d 285 (2001), the defendant had been convicted of murder, felony murder, conspiracy to commit murder, kidnapping in the second degree and conspiracy to commit kidnapping in the second degree. *Id.*, 787–88. On direct appeal to our Supreme Court, the defendant claimed, inter alia, that his convictions and sentences for both

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*america Ins. Group*, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999) (“[T]his court’s policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc.”). Whatever the source of that policy, it has not been enshrined in a discrete rule of practice and has become a rule of thumb only by practice. That said, I do not dispute that following this policy enhances collegiality on the court as well as confidence in the reliability and consistency of the Appellate Court generally. In the rare circumstance in which both panels in the original and subsequent appeals are comprised of the same judges, however, I believe we could revisit our earlier opinion if we thought doing so would serve justice, as we would then only be reviewing our own work. In *Chung v. Commissioner of Correction*, 245 Conn. 423, 434 n.7, 717 A.2d 111 (1998), the late Justice David M. Borden, in disavowing a prior opinion he had authored, quoted Justice Robert Jackson who, in a somewhat parallel circumstance, opined: “Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others.” (Internal quotation marks omitted.) Having gained time for reflection, if not wisdom, I now believe that we erroneously misled the bench and bar in *Santiago* and, in this instance, remorse begs correction either by this panel or on the next rung of Connecticut’s judicial ladder.

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murder and felony murder violated his right to the protection of double jeopardy as did his convictions for conspiracy to commit kidnapping and conspiracy to commit murder, because the murder and felony murder convictions were for the same act, and his two conspiracy convictions were supported by evidence of a single agreement to kidnap and murder the victim. *Id.*, 803–808. In its opinion, our Supreme Court observed, with apparent approval, that, after trial, the trial court, pursuant to the state’s motion to correct an illegal sentence, had merged the defendant’s convictions for murder and felony murder and imposed one sentence for the merged offenses. The court opined: “In this case, the trial court had jurisdiction to correct the defendant’s sentences pursuant to Practice Book § 43-22 . . . . Both the trial court and this court, on appeal, have the power, at any time, to correct a sentence that is illegal.” (Internal quotation marks omitted.) *Id.*, 803–804.<sup>8</sup> The court in *Cator* stated, as well: “It is clear in this case that the trial court at first imposed an illegal sentence. That court retained jurisdiction to correct that sentence

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<sup>8</sup> Since *Cator*, the availability of an attack on one’s sentence on direct appeal appears to have narrowed. In *State v. Urbanowski*, 163 Conn. App. 377, 384–85, 136 A.3d 236, cert. granted, 321 Conn. 905, 138 A.3d 280 (2016), this court held that, where a defendant had not sought to correct an illegal sentence by filing a Practice Book § 43-22 motion in the trial court, it is inappropriate to raise an illegal sentence claim for the first time on direct appeal. Also, in the context of a habeas corpus petition, our Supreme Court has held that a petitioner who attacks his sentence or disposition as illegal, and who did not first file a motion to correct an illegal sentence, may be procedurally defaulted from later raising such a claim in a habeas petition. *Crawford v. Commissioner of Correction*, 294 Conn. 165, 197–99, 982 A.2d 620 (2009). One can only speculate as to whether the holdings in *Urbanowski* and *Crawford* have contributed to the surge of Practice Book § 43-22 motions. In the case at hand, counsel conceded her belief that she was required to file such a motion in the trial court in order to preserve her client’s later habeas opportunity. To me, such confusion makes it abundantly clear that the court needs to clearly explicate the difference between a sentencing claim and a conviction claim in the context of Practice Book § 43-22 and, if the two can be intertwined, the limited circumstances in which that may be permitted.

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pursuant to Practice Book § 43-22. Accordingly, it was proper for the trial court to merge the convictions for murder and felony murder pursuant to [*State v. Chicano*, 216 Conn. 699, 584 A.2d 425 (1990), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991)]. Once this was done, the defendant's claim of double jeopardy became moot." *State v. Cator*, supra, 805.<sup>9</sup> This court later appears to have applied the reasoning of *Cator* to sanction the action of the trial court in vacating a conviction pursuant to § 43-22. In *State v. Brown*, 153 Conn. App. 507, 101 A.3d 375 (2014), cert. granted, 319 Conn. 901, 122 A.3d 636 (2015) (appeal withdrawn August 15, 2016), on direct appeal, we observed: "The defendant . . . claims that his conviction of certain charges violated his constitutional right against double jeopardy. In his reply brief and at oral argument before this court, however, the defendant subsequently withdrew certain aspects of this claim. He did so specifically because the state conceded that the failure to merge the conviction of conspiracy to commit larceny in the third degree with the conviction of conspiracy to commit burglary in the third degree violated principles of double jeopardy, and because the court later granted his motion to correct an illegal sentence and vacated without prejudice the conviction of one of the two conspiracy counts." *Id.*, 532.

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<sup>9</sup> *Cator* appears to have derived its pedigree from *Chicano*, in which our Supreme Court opined that when a defendant is convicted of both a lesser and greater offense, the proper course for the court is to merge the convictions into one. *State v. Chicano*, supra, 216 Conn. 725. More recently, our Supreme Court has reversed that jurisprudence and now holds that the proper course, in such a situation, is for the court to vacate the lesser conviction and sentence on the conviction for the greater offense. *State v. Polanco*, supra, 308 Conn. 245. Later, the rule of *Polanco* was expanded to include situations involving cumulative convictions for the same offense. See *State v. Miranda*, 317 Conn. 741, 755–56, 120 A.3d 490 (2015).

In this line of cases, it appears, from *Cator*, that the trial court has jurisdiction to take such remedial action pursuant to Practice Book § 43-22, notwithstanding that adherence to our Supreme Court in this regard would appear to expand the jurisdiction of the trial court in a Practice Book

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While recognizing the *Cator* line of cases, I do not believe the intent of the court, in these cases, was to open wide the door to attacks on convictions through the guise of a Practice Book § 43-22 motion, nominally assailing a sentence. To do so, as I believe, with respect, the majority now does, would vitiate the limited purpose of § 43-22, and unreasonably expand the court's postconviction jurisdiction beyond its common-law bounds. Nevertheless, I believe that the holdings of the cases cited herein, in toto, create currents and crosscurrents in need of calming by a higher power.

The majority holds that the trial court had jurisdiction over the defendant's claims in the case at hand because he claimed, as the basis of his motion, that his convictions and sentences violate the constitutional proscription against double jeopardy. As noted, however, we know that where a defendant only nominally attacks his sentence in order to attempt to fit a conviction claim into the ambit of a Practice Book § 43-22 motion, a reviewing court will look to the substance and not the precise language of a defendant's motion to determine if it is, in fact, a sentencing issue. In this case at hand, however, as in *Santiago*, the majority appears to have credited the defendant's claim as a true sentencing claim even though, like *Wright*, it is an attack on his conviction.

In order to calm this jurisprudence, it is appropriate and useful to reflect on our Supreme Court's characterization of a motion to correct an illegal sentence. In *State v. Francis*, 322 Conn. 247, 259–60, 140 A.3d 927 (2016), the court opined: “A motion to correct an illegal sentence constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates. . . . Indeed, [i]n order for the court

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§ 43-22 circumstance to permit the court to affect both a conviction and an attendant sentence.

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to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . . Therefore, the motion is directed to the sentencing court, which can entertain and resolve the challenge most expediently.” (Internal quotation marks omitted.) While the court, in *Francis*, assessed whether appointed counsel in a motion to correct an illegal sentence should be required to write an *Anders* brief<sup>10</sup> in order to be relieved of further representation, in coming to the conclusion that counsel could be excused through a less rigorous process, the court characterized a motion for the correction of an illegal sentence in a manner instructive to our present analysis. There, the court opined: “In light of the limited and straightforward nature of the claims that may be raised in a motion to correct, the potential merits of such a motion frequently will be apparent to the court and appointed counsel from a simple review of the sentencing record. . . . Accordingly, we can perceive no reason why appointed counsel, having carefully reviewed the record for possible sentencing errors in light of the governing legal principles and determined that none exist, must then be required to file an *Anders* brief identifying anything in the record that might arguably support a countervailing view, or why the trial court should then be required to undertake a full and independent review of the record to determine whether it agrees

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<sup>10</sup> “In *Anders* [v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)], the United States Supreme Court outlined a procedure that is constitutionally required when, on direct appeal, appointed counsel concludes that an indigent defendant’s case is wholly frivolous and wishes to withdraw from representation. . . . Under *Anders*, before appointed counsel may withdraw, he or she must provide the court and the defendant with a brief outlining anything in the record that may support the appeal, and the defendant must be given time to raise any additional relevant points. . . . Thereafter, the court, having conducted its own independent review of the entire record of the case, may allow counsel to withdraw, if it agrees with counsel’s conclusion that the appeal is entirely without merit.” (Citations omitted.) *State v. Francis*, *supra*, 322 Conn. 250 n.3.

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with defense counsel's assessment of the defendant's claimed sentencing error." (Citations omitted.) *Id.*, 265–66. And yet, to decide this defendant's claim on the merits, both the trial court and the majority on review, were required to do just that.

Unfortunately, the observations of the court in *Francis* regarding the narrow focus and expedited process of a motion to correct an illegal sentence do not reflect the course such motions have taken over the past several years. Rather, it appears that the filing of a motion to correct an illegal sentence has gained in practice as courts on review have muddied the jurisdictional waters with a result that more and more defendants appear willing to give it a try, even though, in the main, the vast majority of them are ultimately unsuccessful.<sup>11</sup>

To be true to *Francis*, I believe, respectfully, we need to reset the parameters of a motion to correct an illegal sentence. If it is intended to be an expedited and limited review of the sentencing procedure, perhaps we should return to a time period in which such a motion must

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<sup>11</sup> My research for the time period 2000 through the end of 2016 reveals that the number of Superior Court decisions on motions to correct illegal sentences has dramatically increased over the past nearly two decades, with a substantial acceleration in the past few years. From 2000 through 2006, the numbers ranged from zero to three. From 2007 through 2012 the number of filings ranged from five to twelve, and from 2013 through 2016 the numbers ranged from five to twenty-four. Allowing for filings based upon the United States Supreme Court's juvenile justice decisions, the top number of that range would be reduced by eight such filings in 2016, the highest year.

And, finally, the record puts in doubt the notion advanced by the court in *Francis* that a motion to correct an illegal sentence should result in an expedited hearing before the original sentencing judge. *State v. Francis*, supra, 322 Conn. 259–60. Indeed, with respect to fifteen cases randomly surveyed, the time period between sentencing and the hearing on the motion to correct averaged 9.3 years, with a low of seven months and a high of sixteen years and, understandably, the judge who heard the motion to correct was the original sentencing judge in only one of those cases. Finally, it may be factually, if not legally, interesting to note in regard to the fifteen surveyed cases, that the defendants in fourteen of those cases were unsuccessful either on the merits or because the court lacked jurisdiction to hear the motion.

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be filed. And, to harmonize the *State v. Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), and *Miranda* line of cases; see footnote 9 of this dissenting opinion; perhaps it should be made clear that only when it is obvious from the criminal information and verdict that convictions violate the protection against double jeopardy that a court may vacate a conviction and resentence a defendant pursuant to Practice Book § 43-22 and that such remedial action can only be taken before a defendant has commenced serving his or her sentence.<sup>12</sup> In the absence of clarification, it is likely that an increasing number of defendants, in reliance on *Santiago*, this case, and the *Polanco-Miranda* cases will be filing motions to correct illegal sentences which are simply collateral attacks on convictions which could have been timely appealed.

Because I believe the majority has mistakenly followed *Santiago*, which veered from its antecedents, and because, I believe, this court has expanded the reach of *Polanco* and *Miranda* beyond their intended reach, I would affirm the trial court's dismissal.<sup>13</sup> Accordingly, I respectfully dissent.

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<sup>12</sup> This suggestion, if found sensible, could perhaps be accomplished by the creation of a rule that, after conviction but before imposition of sentence, either party may move to have a conviction vacated pursuant to either *State v. Polanco*, supra, 308 Conn. 242, or *State v. Miranda*, supra, 317 Conn. 741.

<sup>13</sup> At trial, the court initially dismissed the motion, not for want of jurisdiction but on the merits. The majority reverses only the form of the judgment. I would affirm the judgment not for the reason stated by the trial court but because the court had no jurisdiction. It is axiomatic that on appeal we may affirm a trial court on alternative grounds. See *Johnson v. Rell*, 119 Conn. App. 730, 736, 990 A.2d 354 (2010) (question of subject matter jurisdiction can be raised sua sponte by the court).

In the case at hand, after oral argument, we asked counsel to brief the question of whether the trial court had jurisdiction to hear the defendant's motion. The majority summarily concludes that both parties agree that the court had jurisdiction over the defendant's motion to correct. I think it is a fair observation that while both parties stated their belief that the court had jurisdiction, the state came to that conclusion on the basis of its belief that we are constrained by *Santiago*. It is noteworthy that the state, nevertheless, offered its view that this jurisprudence may be incorrect and, accord-

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STATE OF CONNECTICUT v. CHANDRA BOZELKO  
(AC 39466)

Lavine, Sheldon and Flynn, Js.

*Syllabus*

The defendant, who had been convicted of ten felonies and four misdemeanors in connection with four separate incidents involving larceny, attempt to commit larceny, identity theft, forgery, illegal use of a credit card and attempt to commit illegal use of a credit card, appealed to this court from the trial court's denial of her motion to correct an illegal sentence. In her motion, the defendant alleged that the presentence investigation report utilized by the sentencing court had been prepared without her input, and that because the incomplete report contained material and harmful misrepresentations about her, including her purported lack of cooperation in the preparation of the report by refusing to participate in a presentence investigation interview, she was sentenced in an illegal manner because her sentence was based on inaccurate and misleading information in violation of her due process rights. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence: even if the defendant's probation officer had misrepresented the defendant's unwillingness to assist in the preparation of the presentence investigation report, the defendant failed to establish either that such misrepresentation was material to her sentencing or that it was actually relied on by the sentencing court, and, therefore, the trial court did not err in concluding that the defendant had failed to prove that the sentencing court gave specific weight or consideration to inaccurate or misleading information when it imposed its sentence, and although the defendant claimed that it was impossible for her to prove what portions of the report the sentencing court actually relied on because she was not permitted to subpoena the judge to testify at

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ingly, the state reserved its right to argue the question of jurisdiction should this opinion be reviewed by the Supreme Court. In brief, and after reviewing our jurisprudence in this regard, the state commented: "Notwithstanding Connecticut jurisprudence suggesting that true double jeopardy claims may be raised via a motion to correct an illegal sentence, that conclusion may be misguided given the multifaceted nature of double jeopardy claims, which come in various forms and can arise at various points in a prosecution. As such, double jeopardy claims cannot be considered as purely relating to sentencing." Thus, I believe it would be more accurate to conclude that the state feels constrained by our somewhat confusing jurisprudence on this issue and not that the state embraces it as a correct understanding of the parameters of Practice Book § 43-22.

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the evidentiary hearing, the defendant failed to file a motion for articulation with respect to those portions of the report considered and relied on by the sentencing court; moreover, the defendant was not precluded from presenting mitigating evidence to the court, as the defendant and her counsel were afforded nearly twenty-six hours to review the substance of the report and discussed a number of mitigating factors with the sentencing court, including the defendant's background, her advanced education, her full restitution to each of the victims and her role as a caregiver for her sick father, and she was afforded an opportunity to address the court and to present additional mitigating evidence, but declined to do so.

Argued May 16—officially released August 15, 2017

*Procedural History*

Substitute information, in the first case, charging the defendant with the crimes of attempt to commit larceny in the first degree, identity theft in the first degree, attempt to commit illegal use of a credit card and forgery in the third degree, and substitute information, in the second case, charging the defendant with the crimes of larceny in the third degree, identity theft in the third degree, illegal use of a credit card and forgery in the third degree, and substitute information, in the third case, charging the defendant with the crimes of attempt to commit larceny in the fifth degree, attempt to commit illegal use of a credit card and identity theft in the third degree, and substitute information, in the fourth case, charging the defendant with the crimes of larceny in the fifth degree, illegal use of a credit card and identity theft in the third degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, where the cases were consolidated; thereafter, the matter was tried to the jury before *Cronan, J.*; verdicts and judgments of guilty, from which the defendant appealed to this court, which affirmed the judgment of the trial court; subsequently, the Supreme Court denied the defendant's petition for certification to appeal; thereafter, the court, *Arnold, J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court, which

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reversed the judgment of the trial court and remanded the case for a hearing on the defendant's motion to correct an illegal sentence; subsequently, the court, *Arnold, J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

*Chandra Bozelko*, self-represented, the appellant (defendant).

*Kathryn W. Bare*, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, *Paul O. Gaetano*, supervisory assistant state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (state).

*Opinion*

SHELDON, J. This case returns to this court following our reversal of the trial court's ruling<sup>1</sup> that it lacked subject matter jurisdiction over the defendant's motion to correct an illegal sentence, and the resulting remand to the trial court, *Arnold, J.*, for further proceedings on the merits of the defendant's motion. *State v. Bozelko*, 154 Conn. App. 750, 766, 108 A.3d 262 (2015). The defendant claimed that the sentencing court, *Cronan, J.*, sentenced her in an illegal manner by relying on misleading or inaccurate information set forth in her presentence investigation report (PSI). *Id.*, 763–64. On remand, Judge Arnold denied the defendant's claim, finding that the defendant had failed to present any evidence showing that the sentencing court had relied on misleading or inaccurate information in imposing her sentence. On appeal, the defendant challenges that determination. We affirm the judgment of the trial court.

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<sup>1</sup> The trial court ruled in four consolidated cases. *State v. Bozelko*, Superior Court, judicial district of Ansonia-Milford, geographical area number five at Derby, Docket Nos. CR-050128445-S, CR-050129108-S, CR-050128811-S, CR-050129107-S (January 17, 2013).

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The lengthy procedural history of this case was previously set forth by this court, inter alia, on the defendant's direct appeal from her underlying convictions; see *State v. Bozelko*, 119 Conn. App. 483, 485–87, 987 A.2d 1102, cert. denied, 295 Conn. 916, 990 A.2d 867 (2010), cert. denied, U.S. , 134 S. Ct. 1314, 188 L. Ed. 2d 331 (2014); and in our decision remanding this matter back to the trial court. *State v. Bozelko*, supra, 154 Conn. App. 752–58. Following our decision remanding the matter back to the trial court, an evidentiary hearing on the defendant's motion to correct was held on July 13, 2015, and February 1, March 7, and March 28, 2016. In that hearing, Judge Arnold received testimony and documentary evidence as to the circumstances in which the defendant's December 7, 2007 sentencing took place.<sup>2</sup> Thereafter, on June 23, 2016, the court issued its written memorandum of decision denying the defendant's motion to correct an illegal sentence.

The following facts are set forth in the court's written memorandum of decision. "The defendant . . . was convicted following a jury trial involving [ten felonies and four misdemeanors based upon her involvement in four separate incidents involving larceny or attempt to commit larceny, identity theft, illegal use of a credit card or attempt to commit illegal use of a credit card, and forgery]. On December 7, 2007, following the preparation of a [PSI] by the Department of Adult Probation, the defendant was sentenced by Judge Cronan . . . [to] a total effective sentence of ten years, [execution] suspended after . . . five years, with four years of probation following her release. . . . The defendant, who is self-represented, filed a motion to correct an illegal sentence on February 14, 2012. She concedes that the actual sentence . . . was not illegal, but rather, the

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<sup>2</sup> Judge Cronan recused himself from the postsentencing hearings after the defendant filed a judicial grievance against him.

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sentence was imposed in an illegal manner. . . . Specifically, she claims that the [PSI] utilized by the court at her sentencing, was compiled without her participation, and . . . contained a material misrepresentation . . . because she was ‘tricked out’ of participation in the report’s preparation by the probation officer, who reported to the court that the defendant refused to participate in preparing the report.<sup>3</sup> The defendant argues that this ‘material misrepresentation’ by the probation officer was prejudicial to the defendant.” (Footnotes altered.)

“A review of the December 7, 2007 sentencing transcript revealed that . . . [the defendant’s counsel] Attorney [Tina] D’Amato . . . requested a continuance of the defendant’s sentencing hearing, stating that the defendant had not had the opportunity to meet with the probation officer and complaining that probation officer [Lisa] Gerald was biased toward the defendant. . . . The [sentencing] court noted that it was in possession of a [PSI] . . . [but] indicated it was not going to hear argument as to why the defendant’s interview was or was not done on time, providing an indication that this was not a primary concern or consideration of the court in imposing a sentence. . . .

“In the course of the state’s sentencing presentation, the state summarized the charges that the defendant had been convicted of and . . . [noted that, while] the defendant faced a maximum incarceration in excess of

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<sup>3</sup> The circumstances surrounding the defendant’s participation in the PSI have been discussed previously by this court. See *State v. Bozelko*, supra, 154 Conn. App. 753–54. The defendant takes issue with the following portion of the PSI: “On November 21, 2007, this officer received two voicemail messages from the offender in which she alleged that the [court] informed her that she ‘was refusing to cooperate with the PSI.’ This officer clarified the issue and informed the offender that due to her decision regarding her [PSI] interview this office was left with insufficient time to complete an investigation, a consequence of her decision. This officer, once again, directed the offender to appear in [c]ourt as directed.”

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one hundred years, the state requested a total effective sentence of ten years [of] incarceration, execution suspended after . . . five years, followed by five years [of] probation supervision. Defense counsel then informed the court [that] she was not ready for sentencing, as she didn't know enough about the defendant to advocate for her.<sup>4</sup> Counsel did [however] admit that she had read the transcripts of the defendant's court proceedings . . . [and counsel] then related facts regarding the defendant's family background; her troubled relationship with her parents and involuntary hospitalization of the defendant by her parents. Counsel informed the court that the defendant had been diagnosed with schizophrenia, bipolar disorder and personality disorder; [and] had been forced to take antipsychotic medications. . . . Counsel informed the court that full restitution for her crimes had been accomplished; and that the defendant provided care for her [sick] father." (Footnote added.) "Counsel then reiterated that the defendant had been a student at Fordham University and was a graduate of Princeton University. The court then inquired if the defendant wished to make a statement. The defendant declined. In doing so, the defendant did not address the contents of the [PSI]; did not [raise] any claimed inaccuracies or misrepresentations; and did not present the court with further information in mitigation.

"The [sentencing] court commenced its sentencing comments by noting the defendant had been found competent to stand trial . . . . The court noted that the defendant was an intelligent person of privilege compared to many defendants who [had] been sentenced by the court. . . . The court noted that it was aware of the defendant's lack of a previous criminal record, and that the offenses for which the defendant was convicted were not crimes of violence. Nonetheless, the

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<sup>4</sup> D'Amato was retained by the defendant shortly before sentencing.

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court stated that the crimes regarding identity theft and credit card fraud were crimes [that] the court could not take lightly. . . . The trial court . . . then imposed the sentences which were noted earlier, herein.” (Citation omitted; footnote omitted.)

“[I]n its original [memorandum of decision on the motion to correct, the trial court] found that other than arguing that the [sentencing] court did not follow the proper procedural rules,<sup>5</sup> the defendant had not demonstrated how the court’s error caused her prejudice with regard to the sentence imposed. . . . [T]he defendant never claimed that the [sentencing] court refused to consider her claims of any disputed facts in the [PSI]. It appears from the review of the record that the defendant’s claims of inaccuracies are related solely to whether . . . she refused to cooperate in the preparation of the [PSI]. While her counsel addressed this issue, the defendant, despite being given the opportunity to do so at her sentencing, declined to comment or make a statement to the [sentencing] court. Additionally, there is no evidence that the court considered this issue when structuring or imposing the defendant’s sentence.” (Citations omitted; footnote added.) “Neither defense counsel, the defendant, [nor] anyone else alerted the [sentencing] court to any allegedly inaccurate information in the [PSI] other than the alleged ‘misrepresentation’ that the defendant refused to cooperate [in completing the PSI] . . . .”

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<sup>5</sup> On appeal, the defendant claims that the manner in which she was sentenced violated several sections of the Practice Book. During oral argument before this court, however, the defendant conceded that the scope of our remand order was narrow: whether there was evidence demonstrating that the sentencing court relied on materially misleading or inaccurate information when it structured her sentence. She similarly conceded to the trial court that the purpose of the evidentiary hearing was to afford her an opportunity to prove that the sentencing court relied on inaccurate information when structuring her sentence. In accordance with the limited scope of our remand order, we decline to address the defendant’s claims that the sentencing procedure violated various provisions of our rules of practice.

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“Having made these foregoing findings . . . the court review[ed] the evidence presented by the defendant at the evidentiary hearing conducted at the direction of the Appellate Court . . . to determine if the trial court . . . relied on inaccurate or misleading information when sentencing the defendant. The court heard testimony from Chief Probation Officer Lisa Gerald on July 13, 2015. . . . Gerald confirmed that the defendant was not refusing to cooperate in completing the PSI process, but was seeking a delay until the defendant could secure the services of a new attorney. . . . Gerald . . . did not believe the defendant was engaging in delaying tactics, but [she] stated [that] as a probation officer she had no authority to unilaterally order a continuance of the defendant’s sentencing date. Therefore, she continued to write a partial PSI, using only information that was available to her from sources other than the defendant. . . . [A]n examination of the PSI . . . indicates that the report copy was faxed to . . . D’Amato on December 6, 2007, at 12:07 p.m.” (Citation omitted.)

“D’Amato testified . . . that the defendant retained her services for the purposes of the sentencing hearing. She stated that she filed a motion for continuance of the sentencing hearing as she was not prepared to go forward. . . . Nonetheless, D’Amato stated that she was, in fact, prepared for the defendant’s sentencing on December 7, 2007, although she had not planned on going forward. She also stated [that] she had no plan to present mitigation witnesses or mitigating circumstances. She knew [however] of the defendant’s intent to hire Clinton Roberts, a mitigation specialist, because she . . . had spoken to Roberts.” (Footnote omitted.)

“On March 7, 2016, the court heard testimony from . . . Roberts who was called as a witness by the state. . . . Roberts stated that . . . [he was given payment by the defendant’s] family on November 24, 2007 . . . .

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However, his acceptance of the payment was contingent on the defendant being able to obtain a continuance of her [December 7, 2007] sentencing date . . . [because] it would take six to eight weeks to complete a sentence mitigation report for the defendant . . . . When the defendant was denied a continuance of her sentencing . . . Roberts offered to remit the payment back to the family . . . [but was] advised that the family wished to retain his services for postsentencing proceedings . . . . Roberts further testified that once he completes a mitigation report, he testifies at the sentencing hearing only if defense counsel requests that he do so and if the court agrees to it. The information contained in a sentencing mitigation report prepared by Roberts is similar to that of a [PSI] . . . . His sentencing mitigation report would contain information regarding family and personal data, educational background, employment history, and a summary of physical and mental health issues, substance abuse issues, and family relation issues. . . . When asked by the court how his report differs from a [PSI], Roberts replied that he tries ‘to get a bit deeper’ into a person’s background . . . but as he had little information about the defendant, he could not testify regarding any issues about this defendant.” (Footnotes omitted.) “At no time did Roberts offer any testimony regarding specific information about the defendant, favorable or otherwise, that would have been presented at the sentencing . . . had a continuance of the sentencing been granted.”

“In remanding this matter . . . the Appellate Court noted that in order for the defendant to ultimately prevail on her claims, she will need to prove the [sentencing] court’s actual reliance on misinformation, which will require a showing that the court gave ‘specific consideration’ or weight to the unreliable or inaccurate information she complains of in imposing her sentence. . . . The defendant has failed to sustain that burden.

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None of the evidence presented and received at the hearing held by this court supports the defendant's position that the sentencing court relied on unreliable or inaccurate information when imposing the defendant's sentence on December 7, 2007. . . . The defendant provided no evidence that Judge Cronan relied on any misinformation or misrepresentation regarding the defendant's delay in meeting with . . . Gerald in the preparation of the [PSI]. There is also no indication that Judge Cronan imposed a more severe sentence on the defendant due to the defendant's desire to postpone her meeting with Gerald until the defendant obtained the services of new counsel. . . .

"D'Amato confirmed that she had reviewed the trial transcripts and spent thirty to forty hours interviewing the defendant and reviewing the defendant's trial. At the sentencing, [D'Amato] presented evidence that the defendant: (1) assisted in caring for her ill father; (2) had no prior criminal record or arrests; (3) had previously been institutionalized and medicated for mental health issues; (4) made full restitution to the victims; (5) graduated from Princeton University; and (6) attended Fordham Law School. . . . The defendant has not raised any issue that this information [presented] to the court was a misrepresentation or inaccurate in any way."

After making the foregoing findings of fact, the court ruled that the defendant had failed to carry her burden of proof, and thus it denied her motion to correct an illegal sentence. This appeal followed.

On appeal, the defendant claims that the trial court abused its discretion in denying her motion to correct an illegal sentence. More particularly, the defendant argues that, in deciding upon her sentence, Judge Cronan relied on what she claims to have been material misrepresentations in the PSI, including the statements

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that she had “[refused] to cooperate with [Gerald]” in preparing the PSI, and that the absence of certain portions of the report were “a consequence of her decision [not to cooperate].” The defendant dedicates a substantial portion of her brief to explaining why Gerald’s comment about her noncooperation with the preparation of the PSI was misleading and to denying the suggestion in the report that, by not cooperating, she was engaging in delay tactics. The defendant further argues that “[t]he only way that the sentencing court did not consider Gerald’s material misrepresentations in the [PSI] was to disregard the [PSI] altogether, effectively denying [the defendant an] opportunity to speak in mitigation of her sentence.” On that basis, the defendant argues that Judge Arnold erred in finding that the sentencing court had not relied on misleading or inaccurate information when imposing its sentence upon her. We are not persuaded.

“We begin by setting forth our standard of review. [A] claim that the trial court improperly denied a defendant’s motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court’s decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court’s ruling only if it could not reasonably conclude as it did.” (Citation omitted; internal quotation marks omitted.) *State v. Charles F.*, 133 Conn. App. 698, 704–705, 36 A.3d 731, cert. denied, 304 Conn. 929, 42 A.3d 390 (2012).

“[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence.” *State v. Parker*, 295 Conn. 825, 843, 992 A.2d 1103 (2010). “To prevail on such a claim as it relates to a [PSI], [a] defendant [cannot] . . . merely alleg[e] that [her PSI] contained factual inaccuracies or inappropriate information. . . . [She] must

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show that the information was *materially* inaccurate and that the [sentencing] judge *relied* on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence.” (Citation omitted; emphasis in original; internal quotation marks omitted.) *State v. Charles F.*, supra, 133 Conn. App. 705; see also *State v. Parker*, supra, 844 (“[t]he mere presence of . . . inaccurate information in a [PSI] does not constitute a denial of due process” [internal quotation marks omitted]).

After thoroughly reviewing the record in this case, we conclude that Judge Arnold did not err in determining that the defendant failed to prove that the sentencing court gave specific weight or consideration to inaccurate or misleading information when it imposed its sentence upon her. Although the defendant spent substantial portions of both the evidentiary hearing and her brief attempting to prove that she had not engaged in delay tactics or refused to take part in a PSI interview, such efforts were in vain. Even assuming that Gerald misrepresented the defendant’s unwillingness to assist in the preparation of the PSI, the defendant failed to establish either that such misrepresentation was *material* to her sentencing or the sentencing court *actually relied on* that misrepresentation.

A review of the sentencing transcript clearly demonstrates that the sentencing court “did not reference or otherwise indicate that it was relying on the [PSI’s] assertion that the defendant did not wish to include an offender’s version [in the PSI].” *State v. Charles F.*, supra, 133 Conn. App. 705. Instead, Judge Cronan merely stated: “In trying to structure a penalty I considered the lack of a previous record and that these offenses are not crimes of violence that we often see

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here, but they are, in fact, offenses that the Connecticut General Assembly said deserve, in ten cases, to be treated as a felony . . . . I cannot take this type of conduct lightly . . . . So as I said, I just shook my head and attempted in structuring a sentence to [be] fair, fair to the victims, fair to society, and fair to [the defendant].” The defendant concedes that those portions of the PSI that concerned her lack of a prior criminal history and the nonviolent nature of her offenses of conviction were accurate and did not contain any misrepresentations. The defendant did not and could not argue that the court expressly stated that it considered or gave specific weight to the fact that the defendant had not submitted to a PSI interview with Gerald.

Nonetheless, the defendant contends that the trial court must have relied upon the fact that she did not participate in the PSI interview when it sentenced her. She argues, without any legal citation, that the sentencing court either did not rely on *any portion* of the PSI or it relied on those portions of the PSI that contained misrepresentations. We attach no weight to such an argument, as the defendant overlooks a third, and frankly more obvious, possibility, to wit: that while the court relied on those uncontested portions of the PSI which it discussed on the record, including her lack of a prior criminal history and the nature of the offenses here at issue, it did not rely on other portions of the PSI of which it made no mention. It was the defendant’s burden to prove that the court actually relied on or gave specific weight to inaccurate information, but she failed to carry that burden.

Although the defendant asserts that it was impossible for her to prove what portions of the PSI Judge Cronan actually relied on because she was not permitted to subpoena the judge to testify at the evidentiary hearing, we are cognizant of the fact that the defendant failed to file a motion for articulation with respect to those

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portions of the PSI considered and relied on by the sentencing court. See *State v. Koslik*, 116 Conn. App. 693, 705, 977 A.2d 275 (noting that defendant failed to file motion for articulation regarding decision of sentencing court or decision denying motion to correct illegal sentence), cert. denied, 293 Conn. 930, 980 A.2d 916 (2009). We further reject the defendant's argument that, by virtue of the sentencing court's remark that it was not going to entertain arguments as to why the defendant did not participate in the PSI interview, the court effectively precluded her from presenting any mitigating evidence at sentencing. Not only were the defendant and her counsel afforded nearly twenty-six hours to review the substance of her eleven page PSI, but also her counsel discussed a number of mitigating factors with the sentencing court, including, inter alia: the defendant's background; her advanced education; her full restitution to each of the victims; and her supportive role in her family, caring for her sick father. Moreover, she was afforded an opportunity to address the court and present additional mitigating evidence, but declined to do so. These factors amply demonstrate that the defendant was not precluded from presenting mitigating evidence to the court. See *State v. Charles F.*, supra, 133 Conn. App. 705 n.6.

Because the trial court was not presented with any evidence demonstrating that the sentencing court considered, much less actually relied on, the portion of the defendant's PSI indicating that she had refused to submit to a PSI interview, Judge Arnold, as in *State v. Charles F.*, supra, 133 Conn. App. 706, reasonably could have found "that the sentencing court did not rely on inaccurate information and that the defendant's sentence was therefore not imposed in an illegal manner." We, therefore, conclude that the trial court did not abuse its discretion by denying the defendant's motion to correct an illegal sentence.

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The judgment is affirmed.

In this opinion the other judges concurred.

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BENJAMIN WASHBURNE ET AL. v. TOWN OF  
MADISON ET AL.  
(AC 38721)

Alvord, Sheldon and Prescott, Js.

*Syllabus*

The plaintiff W, individually and on behalf of her minor son, B, who had sustained a broken leg when he was kicked in the shin area by another student while playing soccer in a third grade physical education class, sought to recover damages for negligence from the defendants, the town of Madison, the town's Board of Education, the principal of the elementary school where B was injured, and D, a substitute physical education teacher who was supervising B's class at the time of his injury. W alleged that B was not wearing shin guards at the time he was injured and that the defendants did not provide B or other children with shin guards, which she alleged violated existing school policies and resulted in B's injuries. The trial court granted the defendants' motion for summary judgment on the ground of governmental immunity and rendered judgment thereon, from which W appealed to this court. *Held:*

1. The trial court properly granted the defendants' motion for summary judgment, the court having determined that the acts or omissions underlying W's negligence claims were discretionary in nature and, thus, subject to governmental immunity; the defendants having presented evidence to demonstrate that the decision of whether to require shin guards involved the exercise of judgment and, thus, inherently was discretionary in nature, and W having failed to meet her burden of demonstrating the existence of a clear and unequivocal policy or other written directive mandating the use of shin guards by the town's third grade students, W failed to establish her claim that a genuine issue of material fact existed about whether safety guidelines in the board's physical education guide, specifically, a provision indicating that students should wear shin guards for additional protection, created a ministerial duty the implementation of which was not protected by governmental immunity, as she did not produce any regulation, rule or other directive promulgated by the town or the board that required all students to wear shin guards whenever playing soccer.
2. W could not prevail on her claim that, even if the defendants' acts or omissions were discretionary in nature, there remained a genuine issue of material fact as to whether B had been subject to imminent harm and, thus, fell within the identifiable person/imminent harm exception

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to governmental immunity; W presented no evidence that D or the other defendants were aware that an injury similar to the one suffered by B was so likely to happen that they should have acted to prevent it by requiring the students to wear shin guards, nor did W present any evidence to dispute certain of the board's interrogatory answers, which demonstrated that the probability of soccer related injuries in gym class was very low, or to show that the number of injuries was low because students usually wore shin guards when playing soccer, and although W presented evidence that it was apparent to the defendants that an injury to a child playing soccer without shin guards could occur, the foreseeability of such an injury did not translate to imminent harm without a showing that the probability that the injury would occur from the lack of shin guards was high enough to necessitate that the defendants act to prevent it.

Argued March 9—officially released August 15, 2017

*Procedural History*

Action to recover damages for the defendants' alleged negligence, brought to the Superior Court in the judicial district of New Haven, where the court, *Nazzaro, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the court denied the plaintiffs' motion to reargue, and the plaintiffs appealed to this court. *Affirmed.*

*Hugh D. Hughes*, with whom, on the brief, were *Brian Flood* and *Alexander Bates*, for the appellants (plaintiffs).

*Matthew Dallas Gordon*, with whom, on the brief, was *Nicholas Norton Ouellette*, for the appellees (defendants).

*Opinion*

PRESCOTT, J. The plaintiff, Jennifer Washburne, who brought the underlying action on behalf of her minor son, the plaintiff Benjamin Washburne (Benjamin), and herself individually,<sup>1</sup> appeals from the summary judgment rendered by the trial court in favor of the

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<sup>1</sup> For purposes of clarity and convenience, we refer in this opinion to Jennifer Washburne as the plaintiff, and Benjamin Washburne as Benjamin.

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defendants—the town of Madison (town); the town’s Board of Education (board); Kelly Spooner, the principal of Ryerson Elementary School (Ryerson Elementary); and Erik Delehanty, a substitute physical education teacher—on the ground that the action was barred by governmental immunity.<sup>2</sup> According to the complaint, Benjamin’s leg was broken when he was kicked in the shin or ankle by another student while playing soccer at school. The incident occurred during a physical education class at Ryerson Elementary that Delehanty was supervising. The defendants did not provide Benjamin or the other children with shin guards, and Benjamin was not wearing shin guards at the time he was injured, which the plaintiff alleged violated existing school policies and resulted in Benjamin’s injuries.

The plaintiff claims on appeal that the court improperly rendered summary judgment as a matter of law despite the existence of genuine issues of material fact regarding (1) whether safety guidelines in a curriculum guide, which provided that students playing soccer should “wear shin guards for additional protection,” imposed a ministerial duty on the defendants to require the use of shin guards by students, and (2) whether, even if such a duty was discretionary, Benjamin had been subject to imminent harm and, thus, an exception to governmental immunity was applicable. We disagree and, accordingly, affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. On March 16, 2010, Benjamin was a third grade student at Ryerson Elementary. On that day, as part of an organized activity during a gym class supervised by Delehanty, Benjamin and his classmates were permitted to

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<sup>2</sup> Spooner and Delehanty were sued only in their official capacities.

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play soccer on the school's athletic field. Before allowing them to play, Delehanty instructed the children about safety and the rules of the game, but he did not require the children to wear shin guards. Several minutes into the scrimmage, Benjamin was kicked in the shin or ankle by another student, which resulted in a fracture to Benjamin's lower left tibia and fibula.

The plaintiff commenced this action against the defendants on February 3, 2012. The complaint contained eight counts, each sounding in negligence. Count one invoked General Statutes § 52-557n and claimed that Benjamin's injuries were the result of negligence by the town. The next three counts of the complaint, which also were brought on behalf of Benjamin, alleged negligence on the part of Spooner, Delehanty, and the board, respectively. The remaining four counts, one against each of the defendants, were brought by the plaintiff in her individual capacity to recover funds spent caring for Benjamin's injuries and on his recovery. The gravamen of the plaintiff's negligence claims was that rules, policies, or procedures of the school district required students to wear shin guards when playing soccer, but no shin guards were provided to Benjamin on the day he was injured.<sup>3</sup>

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<sup>3</sup> As stated in the court's memorandum of decision, the plaintiff alleged that Benjamin's injuries were the result of the following negligent and careless acts and omissions: "failure to establish rules or guidelines of supervision and protection of students participating in soccer during school hours; failure to and/or inadequate supervision of students participating in soccer during school hours; failure to establish guidance on how to structure soccer to prevent injury; failure to adopt, instruct, or enforce rules to protect students and prevent injury to students in physical activities and physical education; failure to put in place the proper student to teacher ratio for physical education class and sufficient staff to supervise students; failure to properly train and screen substitute teachers, administrators, and staff to prevent harm to students; permitted substitute teachers without proper training to supervise students; and did not require or provide safety equipment for soccer." In addition, the plaintiff alleged that "the defendants knew or should have known that participation in soccer with[out] safety equipment subjected students to injury; permitting subordinates without proper training to supervise students posed a risk of harm; and safety procedures were

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The defendants filed an answer to the complaint on November 20, 2012, denying the negligence allegations. They also asserted by way of a special defense that the town and its agents were immune from liability for any alleged negligence on the basis of governmental immunity, citing § 52-557n (a) (2) (B). The plaintiff filed a reply denying all allegations of the special defense.

On August 1, 2014, the defendants filed a motion for summary judgment. The defendants claimed that they were entitled to judgment on all counts of the complaint as a matter of law because of the discretionary act immunity afforded by § 52-557n (a) (2) (B), and because the plaintiff could not show that Benjamin was an identifiable person subject to imminent harm, as required to fall within the relevant exception to governmental immunity. In support of the motion for summary judgment, the defendants submitted a memorandum of law attached to which were excerpts from copies of the depositions of Spooner and Delehanty.

The plaintiff filed an opposition to the motion for summary judgment on March 19, 2015. According to the plaintiff, there were genuine issues of material fact that should be resolved by the jury concerning whether the defendants had a ministerial duty, as set forth in a school policy or directive, to ensure that students wore shin guards when playing soccer at school. The plaintiff further argued that, even if the decision to require shin guards was discretionary in nature, there remained a genuine issue of material fact as to whether Benjamin

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needed and warranted.” In opposing summary judgment, the plaintiff limited her argument that the alleged negligent acts or omissions of the defendants were ministerial in nature to those allegations related to the defendants’ failure to follow existing rules requiring students to wear shin guards. Because that is also the sole issue briefed on appeal, we need not consider any unrelated specifications of negligence. See *Verderame v. Trinity Estates Development Corp.*, 92 Conn. App. 230, 232, 883 A.2d 1255 (2005) (claims not raised and adequately briefed on appeal deemed abandoned).

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was an identifiable person subject to imminent harm, and, thus, whether an exception to governmental immunity applied. Attached as exhibits to the opposition were portions of the town's responses to interrogatories; a chart from a curriculum guide titled "Madison Public Schools Physical Education Program: A Framework for Integrated Teaching and Learning" (physical education guide); portions of Madison Public Schools' "Student Welfare/Safety Requirements"; and additional excerpts from Spooner's and Delehanty's depositions.

The defendants filed a reply memorandum in support of summary judgment and in response to the plaintiff's opposition on July 1, 2015. Attached to the reply was an affidavit by James Flanagan, a physical education teacher and physical education coordinator for the board who was responsible for the drafting of the physical education guide; additional excerpts from the physical education guide; and a copy of Benjamin's "Medical Release From Elementary Physical Education," which indicated that, despite a physical issue regarding his foot, he could participate in most regular physical education activities, including playing soccer. The only restricted activity noted was participation in the mile run.

The plaintiff filed a response to the reply memorandum on July 31, 2015, attached to which were excerpts from a publication titled "Madison Public Schools Department of Athletics 2009–2013 Handbook for Student-Athletes, Parents and Coaches"; excerpts from Flanagan's deposition testimony; and another copy of Flanagan's affidavit. That same day the defendants filed a short surreply. The court, *Nazzaro, J.*, heard argument on the motion for summary judgment at a hearing on August 3, 2015.

On November 5, 2015, the court issued a memorandum of decision rendering judgment on all counts of

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the complaint in favor of the defendants. The court concluded on the basis of the pleadings and evidence submitted by the parties that the defendants were entitled to governmental immunity as a matter of law. Specifically, the court determined that the defendants had established their prima facie entitlement to summary judgment because the court's construction of relevant excerpts from the physical education guide and the averments of Flanagan established that the use of shin guards by students was not a mandatory requirement but, rather, involved a discretionary determination as to whether the extra protection afforded by shin guards was warranted under the circumstances. The court also determined that the evidence submitted by and relied upon by the plaintiff in opposition to the summary judgment motion failed to raise a genuine issue of material fact regarding whether the supervision of students playing soccer during a physical education class was a ministerial act or that any policy or procedure in place was intended to limit the discretion of the defendants or prescribe "how to instruct on and provide safety equipment for soccer played during physical education class."

The court also determined that the plaintiff had failed to establish that a genuine issue of material fact existed regarding the identifiable person/imminent harm exception to governmental immunity. In particular, the court stated that the plaintiff's arguments and evidence could not support a determination that the harm suffered was imminent. The court reasoned that although the plaintiff had established that a potential for injury may have been apparent to the defendants, she had failed "to present evidence to demonstrate that the probability of injury to students from not wearing shin guards in gym class was so high that the defendants had a clear and unequivocal duty to act immediately to prevent harm, namely, to provide shin guards for students." The

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plaintiff filed a motion for reargument and reconsideration, which the court denied. This appeal followed.

Before turning to the plaintiff's claims on appeal, we begin by setting forth the standard of review applicable to a trial court's decision to grant a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *DiMiceli v. Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016).

# I

The plaintiff first claims that the court improperly rendered summary judgment as a matter of law because a genuine issue of material fact existed about whether

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safety guidelines in the board's physical education guide, specifically, a provision indicating that students should "wear shin guards for additional protection," created a ministerial duty, the implementation of which was not protected by governmental immunity. We are not persuaded.

The following additional facts are relevant to this claim. In opposing summary judgment, the plaintiff argued that the defendants had a ministerial duty to ensure that all children wore shin guards when playing soccer during physical education classes. In support of that argument, the plaintiff cited to the physical education guide, which included a section titled "Safety Guidelines." That section was in chart format, broken down by sport. Under each sport heading, there were five columns with the following subheadings: "equipment," "clothing/footwear," "facilities," "special rules/instruction," and "supervision." For soccer, the following bullet points were listed under the subheading of clothing/footwear: "no metal or molded cleats"; "wear suitable footwear and clothing"; "wear shin guards for additional protection"; "wear sun protection"; and "no jewelry."

In Flanagan's affidavit, he averred that the use of shin guards was, as indicated in the safety guidelines, only for additional or extra protection, and was meant only as a suggestion to be exercised at the discretion of the individual teacher, not as an absolute requirement. Flanagan also explained that one of the reasons that shin guards were not mandatory equipment was because cleats were prohibited in gym class. He further indicated that there were no notes, records, or other information on file that would have alerted Delehanty that Benjamin needed the additional protection of shin guards. The plaintiff submitted no counteraffidavit or evidence, other than the physical education guide, to

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directly contradict Flanagan's explanation of the guide.

We next set forth the well settled law in this state regarding the liability of municipalities and municipal agents. Although, at common law, a municipality generally was immune from liability for any tortious acts, our Supreme Court has long recognized that "governmental immunity may be abrogated by statute." *Williams v. New Haven*, 243 Conn. 763, 766, 707 A.2d 1251 (1998), citing *Wysocki v. Derby*, 140 Conn. 173, 175, 98 A.2d 659 (1953). General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ." "This language clearly and expressly abrogates the traditional common-law doctrine in this state that municipalities are immune from suit for torts committed by their employees and agents." *Spears v. Garcia*, 263 Conn. 22, 29, 818 A.2d 37 (2003).

Subdivision (2) of § 52-557n (a), however, contains two significant limitations to the statutory abrogation of governmental immunity. The exception at issue in the present appeal provides as follows: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." General Statutes § 52-557n (a) (2) (B). The statutory scheme of § 52-557n, accordingly, distinguishes between discretionary and ministerial acts, "with liability generally attaching to a municipality only for negligently performed ministerial

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acts, not for negligently performed discretionary acts.

. . .

“The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner.” (Citation omitted; internal quotation marks omitted.) *DiMiceli v. Cheshire*, supra, 162 Conn. App. 224.

It is important to emphasize that “[e]xceptions to governmental immunity will be found only if there is a duty to act that is *so clear and unequivocal* that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force.” (Emphasis added; internal quotation marks omitted.) *Ventura v. East Haven*, 170 Conn. App. 388, 402, 154 A.3d 1020, cert. granted, 325 Conn. 905, 156 A.3d 537 (2017), citing *Bonington v. Westport*, 297 Conn. 297, 307, 999 A.2d 700 (2010). Thus, only “[i]f by statute or other rule of law the official’s duty is *clearly* ministerial rather than discretionary” will a cause of action then lie for an individual injured as a result of an official’s allegedly negligent performance. (Emphasis added.) *Shore v. Stonington*, 187 Conn. 147, 153, 444 A.2d 1379 (1982).

“Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases [in which that determination] is apparent from the complaint. . . . [W]hether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to § 52-557n (a) (2) (B), turns on the character of the

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act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions necessarily involved the exercise of judgment, and thus, necessarily were discretionary in nature, summary judgment is proper." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *DiMiceli v. Cheshire*, supra, 162 Conn. App. 224–25.

Furthermore, as this court explained in *Ventura v. East Haven*, supra, 170 Conn. App. 388, anytime a determination of whether official acts are ministerial or discretionary "turns on the interpretation of a municipal ordinance or policy," this raises a question of law that "is inappropriate for a jury to decide." *Id.*, 403, citing, inter alia, *Honulik v. Greenwich*, 293 Conn. 698, 710, 980 A.2d 880 (2009) (noting principles of statutory construction govern interpretation of town policies), and *General Accident Ins. Co. of America v. Powers, Bolles, Houlihan & Hartline, Inc.*, 38 Conn. App. 290, 296–97, 660 A.2d 369 (improper to instruct jury to decide question of law requiring statutory interpretation), cert. denied, 235 Conn. 904, 665 A.2d 901 (1995). The interpretation of policy language is, thus, properly decided by the court, subject to our plenary review. *Ventura v. East Haven*, supra, 403.

As indicated, we construe a municipally created rule, directive, or policy pursuant to the principles of statutory construction. "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute

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itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .” (Internal quotation marks omitted.) *Id.*, 404–405.

Turning to the present case, we are unconvinced on the basis of our review of the evidence submitted in conjunction with the summary judgment proceedings that any language in the safety guidelines clearly imposed a ministerial duty on the defendants to provide Benjamin and the rest of his classmates with shin guards or to ensure that shin guards were worn whenever the children played soccer. The defendants presented evidence to demonstrate that the decision of whether to require shin guards involved the exercise of judgment and, thus, was inherently discretionary in nature, and the plaintiff simply provided no evidence in rebuttal that raised a genuine issue of material fact on that issue.

The plaintiff, in arguing that the defendants violated a ministerial duty, had the burden of demonstrating the existence of a clear and unequivocal policy or other written directive mandating the use of shin guards by the town’s third grade students. In attempting to meet that burden, the plaintiff primarily relied upon language found in the soccer section of a chart taken from the board’s physical education guide. Specifically, the plaintiff directs the court’s attention to a single bullet point stating, “wear shin guards for additional protection.” That language by itself, however, is not the type of clear,

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directory language that courts have found to impose on schools or physical education teachers a ministerial duty “to be performed in a prescribed manner without the exercise of judgment or discretion.” (Internal quotation marks omitted.) *DiMiceli v. Cheshire*, supra, 162 Conn. App. 224. For example, nowhere in the guide is it stated that gym teachers are “required to,” “must,” or “shall ensure” that all students wear shin guards whenever playing soccer. The plaintiff has not produced any regulation, rule, or other directive promulgated by the town or the board to that effect.

Significantly, the chart relied on by the plaintiff comes from a section of the physical education guide titled, “Materials and Resources,” in a subsection titled “Physical Education Safety Guidelines.” The words “Safety Guidelines” are also clearly printed on top of the chart. The inclusion of the safety guidelines in this chapter suggests that they were intended to be used by teachers as a “resource” or information, rather than as strict policy directives that they were obligated to adhere to without the exercise of discretion or independent judgment. In common parlance, a “guideline” is generally understood to reflect an informed suggestion or a best practice. Thus, the use of the term “guidelines,” rather than “mandates” or “directives,” implies that, except where accompanied by specific and clear directory language, the bullet points in the safety guideline charts were informative rather than mandatory in nature.

Certainly, taken out of context, the phrase “wear shin guards” might be construed, as a matter of grammar, as an imperative statement, arguably mandating the use of shin guards. In the present case, however, that phrase is followed by the modifier, “for additional protection,” suggesting that some additional judgment or discretion needed to be exercised to determine whether such additional protection was needed before the phrase would

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become directive. Furthermore, the phrase is but one of several bullet points addressing clothing and footwear, and follows a more clearly directive notation, “no metal or molded cleats.” Because cleats are expressly forbidden in gym classes, this logically renders the use of shin guards relatively less important as a safety concern and, in fact, renders more significant the latter, “for additional protection,” language. Moreover, in the section of the chart dedicated to “special rules/instructions” for soccer, there is nothing requiring an instruction on the use of shin guards, which one would expect to find if the use of shin guards were, in fact, mandatory.

To the extent that the phrase “wear shin guards for additional protection” is ambiguous, and thus susceptible to different meanings, that fact alone supports a determination that the language in the physical education guide was not intended to be a clear and unequivocal waiver of governmental immunity. That notion finds further support in Flanagan’s affidavit, in which he describes the physical education guide as generally representing “an articulation of what students should know and be able to do and supports teachers in knowing how to achieve these goals.” Flanagan’s understanding comports with our own construction of the guide as simply a resource for information, and undermines the plaintiff’s position that the safety guidelines in the guide were intended as mandates that the defendants were obligated to adhere to without the exercise of discretion.

In short, the sole evidence before us regarding the intent of the drafters of the physical education guide and the language in question indicates that it was simply intended to provide information that shin guards *could* be worn for additional protection. As we have already concluded, whether extra protection was needed and whether to utilize shin guards in any given situation

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required the exercise of judgment and, in the present case, fell within the discretion exercised by the defendants.

We are unconvinced that the trial court improperly determined that the acts or omissions underlying the plaintiff's negligence claims were discretionary in nature and, thus, subject to governmental immunity. Accordingly, we reject the plaintiff's claim.

## II

We next turn to the plaintiff's alternative claim that, even if the defendants' acts or omissions were discretionary in nature, the court improperly granted the defendants' motion for summary judgment because there remained a genuine issue of material fact as to whether Benjamin had been subject to imminent harm and, thus, fell within the identifiable person/imminent harm exception to governmental immunity.<sup>4</sup> We disagree.

"The imminent harm exception to discretionary act immunity [for municipalities and their employees] applies when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable [person]; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that [person] to that harm. . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in

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<sup>4</sup> We note that the defendants do not dispute that Benjamin was an "identifiable person" for purposes of the exception, conceding at oral argument on the motion for summary judgment that, as a schoolchild, "[h]e belongs, most likely, to the only set of identifiable persons for purposes of applying the exception that exists in Connecticut." For purposes of our analysis, we focus on the disputed issue of imminent harm.

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discretionary activities has received very limited recognition in this state. . . . [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [in which case] resolution of those factual issues is properly left to the jury.” (Internal quotation marks omitted.) *Strycharz v. Cady*, 323 Conn. 548, 573–74, 148 A.3d 1011 (2016).

In *Haynes v. Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), our Supreme Court reexamined and clarified our jurisprudence with respect to the principle of imminent harm. The court overruled in part its prior holding in *Burns v. Board of Education*, 228 Conn. 640, 650, 638 A.2d 1 (1994), to the extent that it appeared to narrow the definition of imminent harm to harms arising from dangerous conditions that were temporary in nature. *Haynes v. Middletown*, *supra*, 322–23. Instead, it reemphasized its earlier interpretation of imminent harm as stated in its decision in *Evon v. Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989), in which it explained that a harm is not imminent if it “could have occurred at any future time or not at all”; *id.*, 508; and clarified that it “was not focused on the duration of the alleged dangerous condition, but on the magnitude of the risk that the condition created.” (Emphasis omitted.) *Haynes v. Middletown*, *supra*, 322. “[W]hen the court in *Haynes* spoke of the magnitude of the risk . . . it specifically associated it with the *probability* that harm would occur, not the foreseeability of the harm.” (Citation omitted; emphasis in original; internal quotation marks omitted.) *Williams v. Housing Authority*, 159 Conn. App. 679, 704–705, 124 A.3d 537, cert. granted on other grounds, 319 Conn. 947, 125 A.3d 528 (2015). In sum, the Supreme Court concluded that “the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant

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that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.” *Haynes v. Middletown*, supra, 322–23.

In *Williams v. Housing Authority*, supra, 159 Conn. App. 679, this court construed *Haynes* as setting forth the following four part test with respect to imminent harm. “First, the dangerous condition alleged by the plaintiff must be ‘apparent to the municipal defendant.’ . . . We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a ‘clear and unequivocal duty’ . . . to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm. . . . Thus, we consider ‘a clear and unequivocal duty’ . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to necessitate that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm.” (Citations omitted; emphasis omitted; footnote omitted.) *Id.*, 705–706.

Applying the *Haynes* standard to the facts of the present case, the plaintiff’s claim fails as a matter of law and, thus, was properly rejected by the trial court. The plaintiff presented no evidence that Delehanty or the defendants were aware that an injury similar to the one suffered by Benjamin was so likely to happen that they should have acted to prevent it by requiring the

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students to wear shin guards. The only real evidence presented at summary judgment regarding the magnitude of the risk of a student being injured while playing soccer in gym class was contained in the answers to interrogatories provided by the board. The board was asked to identify the number of times during the three year period prior to Benjamin's injury that "a student was injured while participating in a Madison public school gym class." The response was that twenty-eight incidents had occurred. The next interrogatory asked the board to "identify the number of injuries which occurred during a soccer focused gym class." The answer was none. Thus, the probability of a soccer related injury was statistically very low. The plaintiff presented no evidence to dispute those responses or to show that the number of injuries was low because students usually wore shin guards when playing soccer.

Certainly, the plaintiff presented evidence that it was apparent to the defendants that an injury to a child playing soccer without shin guards could occur, as evidenced by Flanagan's and Delehanty's deposition testimony acknowledging the potential for such an injury. Foreseeability of an injury, however, does not translate to imminent harm without also showing that the probability that an injury will occur from the dangerous condition—here, the lack of shin guards—is high enough to necessitate that the defendants act to prevent it. Because we agree with the trial court that the plaintiff failed to present evidence demonstrating a genuine issue of material fact regarding the probability of injury to students from not wearing shin guards in third grade gym class, we reject the claim that the court improperly granted summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

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